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No. 92-___

In The

Supreme Court of the United States

October Term, 1992

DONALD G. RESHA, JR. and
STATE OF FLORIDA,

Petitioners,

v.

KATIE D. TUCKER,

Respondent.

**Petition For A Writ Of Certiorari
To The District Court Of Appeal Of Florida,
First District**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the First and Fourteenth Amendments to the United States Constitution provide a qualified right of public access to judicial records of completed criminal prosecutions?

II. If so, whether courts may order entire court files sealed without setting forth specific factual findings on a case-by-case basis that sealing the records (a) serves a compelling governmental interest, (b) will be effective in protecting that interest, and (c) is no broader than necessary to protect that interest?

III. Whether courts may require members of the public seeking access to judicial records in criminal cases where no such findings ever were made to bear the burden of demonstrating by evidence why access to the records serves the public interest?

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No. 92-___

In The

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DONALD G. RESHA, JR. and
STATE OF FLORIDA,

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v.

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Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

PETITION FOR WRIT OF CERTIORARI

Petitioners Donald G. Resha, Jr. and the State of Florida respectfully pray this Honorable Court for a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, First District, refusing to unseal court records of the criminal charges against Respondent, Katie D. Tucker, a former public official of the State of Florida.

OPINIONS BELOW

The decision of the Florida First District Court of Appeal is reported at 600 So. 2d 16 (Fla. Dist. Ct. App. 1992), and is reprinted in the Appendix to this Petition at

A2-6.[1] On March 11, 1993, after full briefing on the merits, the Florida Supreme Court dismissed Petitioner Donald G. Resha, Jr.'s petition for review in a decision reported at 615 So. 2d 158 (Fla. 1993), and reprinted at A1. The trial court order denying Petitioner Donald G. Resha, Jr.'s request to unseal the court file concerning the prosecution and no contest plea of Respondent was entered February 24, 1992 and is not reported but is reprinted at A7-9.[2] The trial court order sealing the court file, originally entered October 3, 1991, is not reported but is reprinted at A92-94.

JURISDICTION

The Florida Supreme Court entered its order declining review of the Florida First District Court of Appeal's decision on March 11, 1993. The order specified that no motions for rehearing would be entertained. This petition is docketed within 90 days from entry of the Florida Supreme Court's order. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

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[1] References to the Appendix are designated "A___."

[2] The order is entitled "Order on Resha's Motion for Reconsideration." *See* A7.

Fourteenth Amendment, United States Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Florida Statutes § 943.058 (1991).[3]

Florida Rule of Criminal Procedure 3.692 (1991).[4]

STATEMENT OF THE CASE

A. Statement of Facts.

Respondent Katie D. Tucker was the Executive Director of the Florida Department of Revenue from June 1988 to February 1990. A97.[5] On February 7, 1990, Respondent was arrested by the Florida Department of Law Enforcement ("FDLE") on the criminal charge of "Official Misconduct," a violation of section 839.25 of the Florida

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[3] Because the statute is lengthy, it is reprinted at A101-106.

[4] Because the rule is lengthy, it is reprinted at A106-108.

[5] The Florida Department of Revenue is the state agency charged by law with collection of the state sales tax, various excise taxes, and other premiums. The duties and responsibilities of the Department of Revenue with regard to collection and disposition of specific state taxes are detailed in Chapter 213 of the Florida Statutes (1991). Section 213.01 of the Florida Statutes (1991) declares it the intent of the Florida Legislature that "the revenue laws of this state be administered in a fair, efficient and impartial manner."

Statutes (1991). A92, 94. "Official misconduct" – the knowing falsification of an official record with "corrupt intent to obtain a benefit for [oneself] or another"[6] – is a third degree felony punishable by a term of imprisonment of up to five years or a fine of up to $5,000, or both.[7]

Prior to Respondent's arrest, and as a result of a report issued by the FDLE, Petitioner Donald G. Resha, Jr. ("Resha") had brought a civil suit against Respondent alleging state tort claims and federal civil rights violations perpetrated by Respondent while she was Executive Director of the Florida Department of Revenue. A3. In particular, Resha alleged that Respondent had used her power as Executive Director and the resources of the state government to launch tax-related investigations and audits against Resha and his businesses for the purposes of driving Resha out of the 1989 race for president of the AFL-CIO in Florida (a race in which Respondent's husband was also a candidate), and destroying Resha's

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[6] The statute states, in pertinent part:

> (1) "Official misconduct" means the commission of the following act by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another: knowingly falsifying, or causing another to falsify, any official record or official document.
>
> (2) "Corrupt" means done with knowledge that act is wrongful and with improper motives.
>
> (3) Official misconduct under this section is a felony of the third degree. . . .

Fla. Stat. § 839.25 (1991).

[7] *See* Fla. Stat. §§ 775.082(3)(d) (1991) and 775.083(1)(c) (1991).

viability as a candidate for that post in future elections.[8] A96-97. Resha amended his civil suit after Respondent's arrest, alleging that in order to save her job, Respondent had engaged in a cover-up of her actions by creating false and fraudulent, back-dated documents during the period of time she was suspended from office due to the FDLE's initial report. A99. These manufactured documents formed the basis of Respondent's February 1990 arrest. On June 20, 1991, Respondent finalized a plea bargain whereby she pleaded *nolo contendere* to the misdemeanor charge of "attempted official misconduct," and was sentenced to a year's probation and payment of approximately $3,500 in costs to the FDLE and the court. A3.

It is beyond dispute that on October 3, 1991, without the knowledge of her attorney in the civil lawsuit, Respondent obtained an order from The Honorable N. Sanders Sauls, Circuit Judge of the Second Judicial Circuit in Tallahassee, Florida, sealing "all court records pertaining to" the charge against her. A88-89, 92-94. The only findings made by the court were that Respondent "ha[d] never been previously adjudicated guilty of a criminal offense or comparable ordinance violation," that she "was not adjudicated guilty of charges stemming from" her arrest or the "criminal activity" to which her petition to seal pertained, and that she "ha[d] not secured a prior records expunction or sealing." A92. The order

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[8] In her defense, Respondent asserted, among other things, that she had "full discretionary authority" to order such investigations and audits. The audits showed Resha had failed to pay approximately $300 in state taxes out of a total due of more than $30,000. Resha's civil claims survived a motion for summary judgment. A97.

also sealed all records of the State Attorney, FDLE, and any other law enforcement agency, including the Federal Bureau of Investigation, that had received information about Respondent's arrest. A92-93.

B. The Proceedings Below.

In September 1991, Respondent refused to answer certain questions on deposition in Resha's civil action. On December 31, 1991, Resha obtained a court order directing Respondent to answer, at which time Resha and Respondent's civil counsel first learned of the October 3, 1991 sealing order. A88-89. Resha filed his Motion to Vacate Order Sealing Records on January 6, 1992, asserting, *inter alia*, that the sealing order, as it applied to court records, did not "pass constitutional muster" under the First and Fourteenth Amendments to the United States Constitution.[9] A83-85. Respondent contended in opposition, *inter alia*, that Resha lacked standing to contest the sealing order; that the court no longer had jurisdiction over Respondent; that the records would not be admissible in Resha's civil case because the court withheld adjudication; and that the sealing order was proper under state law. A72-76.

At the hearing on Resha's motion on January 27, 1992, it was revealed that Respondent had already "used

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[9] Resha asserted not only that Respondent had not met the constitutional burden for sealing a criminal court file but also that there had been no notice or opportunity for him to be heard in opposition to the sealing of Respondent's criminal records.

the benefits" of Florida's "sealing and expunction statute" in obtaining a position with the United States Coast Guard. A48, 60, 66-67. The "benefit" presumably referred to is that provision of the statute which allows a person who has obtained an order sealing her criminal history records to "lawfully deny or fail to acknowledge" the arrest, except in certain circumstances.[10] Resha again argued, *inter alia*, that the sealing order did not comport with the First and Fourteenth Amendments. The Respondent argued only state law grounds in support of continued sealing, including the assertion that, as the party seeking to unseal a court file sealed pursuant to Fla. Stat. § 943.058, Resha bore the burden of showing why the file should be unsealed.[11] Respondent never tried to

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[10] *See* Fla. Stat. § 943.058(6) (1991). The only circumstances in which the person cannot lawfully deny or fail to acknowledge the events covered by the sealed records are when the person is (a) a candidate for employment with a criminal justice agency; (b) a defendant in a criminal prosecution; (c) a petitioner for a sealing or expunction of records under section 943.058; (d) a candidate for admission to the Florida Bar; or (e) a candidate for employment by the Florida Department of Health and Rehabilitative Services, a teaching certificate, or employment by a school board, school district, or day care facility. *Id.*

[11] In support of this proposition, Respondent relied on cases arising from efforts of Times Publishing Company, Miami Herald Publishing Company, and the State of Florida to unseal criminal court records relating to a public charity operator, John Lewis Russell, III. *See Russell v. Times Publishing Co.*, 592 So.2d 808 (Fla. Dist. Ct. App. 1992)(pending before this Court on petition for writ of certiorari docketed simultaneously with this Petition), and *Russell v. Miami Herald Publishing Co.*, 570 So.2d 979 (Fla. Dist. Ct. App. 1990).

demonstrate, and never once asserted that she had demonstrated, grounds consistent with the First Amendment for excluding the public from court proceedings or records. Instead, Respondent asserted she was not required to make that showing because of Fla. Stat. § 943.058 (1991). The State of Florida did not object to Resha's motion to unseal the records. A66.

The trial court acknowledged that it entered orders sealing completed criminal cases routinely, without a hearing if the State did not object, simply based on a former defendant's motion and affidavit setting forth that he met the requirements of Florida's statute. A55-56, 58. The court did not address the federal constitutional arguments advanced either at the hearing on Resha's motion to unseal the file or in its order. Instead the court entered an order granting Resha's attorneys limited access to the records of the FDLE, but not to any portion of the court file. Resha's counsel was directed to inform the trial judge in the civil case of the existence of the limited-access order "in the event any such matters are introduced into evidence in the civil trial . . . so adequate safeguards against the public dissemination of such matters may be made." A8. The order further prohibited Resha's counsel from disclosing the contents of the FDLE files except "as absolutely necessary for the trial of the civil case." *Id.*

On March 23, 1992, Resha timely sought review in the First District Court of Appeal of Florida by a petition for writ of certiorari.[12] Again, Resha argued that the First

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[12] *See* Art. V § 4(b)(3), Fla. Const., and Fla.R.App. P. 9.100 (d) (1992).

and Fourteenth Amendments' strictures on excluding the public from court records and proceedings had not been satisfied. In addition, Resha pointed out that as a result of the trial court's order, even Resha's motion to unseal the court file, Respondent's response, and the court's order denying the motion to unseal *were sealed*. A7, 22-28. Respondent again argued that the sealing order was appropriate under state law and that under state law the burden was on Resha to show why access should be granted. Respondent challenged by way of "cross argument" the trial court's limited-access order, asserting it should be vacated. A32-35.

In its opinion filed May 22, 1992, the Florida First District Court of Appeal granted Respondent's petition for writ of certiorari, but denied Resha's. 600 So. 2d at 18, reprinted at A2-6. The court ruled that under Florida law, Resha bore the burden of proof to warrant unsealing of "Respondent's records," including the court file, and that Resha had failed to carry this burden, even in part. *Id.*[13] The court did not specifically address Resha's arguments with regard to the First Amendment. However, the court distinguished *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988), a Florida Supreme Court case suggesting that the public's right of access to court records finds its underpinnings in the First Amendment, by noting that unlike the on-going divorce proceedings State Senator Dempsey Barron had sought to seal, "the

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[13] The court cited *Russell v. Miami Herald Publishing Co.*, 570 So. 2d 979 (Fla. Dist Ct. App. 1990), and *Russell v. Times Publishing Co.*, 592 So. 2d 808 (Fla. Dist. Ct. App. 1992).

criminal proceedings against Respondent were not closed to the public or press." *Id.*

On June 8, 1992, Resha timely moved for rehearing and rehearing *en banc*. On June 30, 1992, the First District Court of Appeal denied the motion. A10-17. Resha timely petitioned for review in the Florida Supreme Court, which initially accepted jurisdiction. *Resha v. Tucker*, 602 So. 2d 534 (Fla. 1992). However, on March 11, 1993, after full briefing, the court dismissed the petition for review. *Resha v. Tucker*, 615 So. 2d 158 (Fla. 1993), reprinted at A1. This Petition timely followed.

C. How the Federal Question Was Raised.

Resha raised the argument in every court, specifically citing the First and Fourteenth Amendments, that the October 3, 1991 court order sealing the criminal court file concerning Respondent's official misconduct charge did not meet federal constitutional standards. The Respondent asserted uniformly that state law permitted the court file to be sealed pursuant to Fla. Stat. § 943.058 (1991), and permitted the courts to place upon the party seeking access the burden of proving that the court files should be unsealed. Uniformly, the state courts refused to recognize any First Amendment right of access to criminal court records.

REASONS FOR GRANTING THE WRIT

Based solely on a Florida statute and state rule of criminal procedure, the courts of Florida sealed, and then

four months later upon Resha's discovery of the sealing order, refused to unseal, the criminal court file documenting the criminal charge that Respondent, a high ranking public official of the State, while in office, falsified official records for personal gain. No "articulated findings" of an "overriding interest" to be served by this sealing order have ever been made.[14] Every Florida court that has addressed this case, both in the first instance when Respondent sealed the court file relating to the charge against her, and later when Resha moved for access to that file, has rejected the concept that the First Amendment protects the public's right of access to it.

Respondent's case is not unique.[15] On the basis of a state statute and rule of procedure alone, Florida's courts have sealed criminal court files from public view without any consideration for the First Amendment values imperiled, even though a majority of the United States Circuit Courts of Appeals have held that such rights inhere in judicial records as well as live courtroom proceedings, and even in light of the societally significant functions this Court has recognized are served by an accessible, not

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[14] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

[15] Contemporaneously with the filing of this Petition, other Petitioners, including the State of Florida, seek this Court's review of a judgment of Florida's Fifth District Court of Appeal in which that court rejected the argument that the First Amendment protects access to the court files of a public charity operator who has had six criminal court files sealed pursuant to Florida's "sealing and expunction" statute and Fla.R.Crim.P. 3.692. *See Times Publishing Company, Miami Herald Publishing Company, and State of Florida v. John Lewis Russell, III*, No. 92-___ (filed June 9, 1993) ("*Times* Petition").

secret, judiciary. In the decision below, the Florida First District Court of Appeal has flatly repudiated any access guarantee – constitutional or common law – as applicable to anything but an on-going proceeding. Thus, in the Florida court's view, completed criminal proceedings may be sealed from public view in perpetuity, without notice, without an opportunity for the public to argue in opposition, and without applying the First Amendment balancing test established by this Court and the United States Circuit Courts of Appeals.[16]

Moreover, once court records have been sealed pursuant to the Florida statute and Fla. R. Crim. P. 3.692, even in absence of a constitutionally sufficient showing by the proponent of secrecy or constitutionally sufficient findings by the court, the proponent of access must bear the burden of adducing evidence why the files should be unsealed.

Congress and 45 State Legislatures have enacted statutes similar to Florida's, with similar objectives in mind.[17] Thus, beyond the prospect of the near-abrogation of First Amendment access rights in Florida, the circumstances presented here are likely to recur across the Nation, imperiling significant First Amendment interests worthy of this Court's protection.[18] Florida's statute, as

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[16] *See Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986), and Section I, *infra*.

[17] *See*, footnote 30, *Times* Petition.

[18] "Because the Federal Government and most of the States have enacted statutes with similar objectives, the issue is significant and likely to recur. We accordingly granted certiorari[.]"

applied by the Florida Court in this case, is repugnant to the First Amendment.

I. The Florida Court Has Decided The Federal Questions Presented In A Way That Conflicts With the Rationale Of this Court's First Amendment Access Decisions And In A Way That Directly Conflicts with Decisions Of The United States Circuit Courts Of Appeals.

Without question, this Court recognizes the societal values served by public access to and observation of the operation of the criminal justice system.[19] As this Court

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Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S. Ct. 501, 508, (1991)(invalidating Son of Sam statute on First Amendment grounds).

[19] In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), seven Justices of this Court found inherent in the First Amendment a right of public access to criminal trials. Two years later, the Court reaffirmed its view in a majority opinion in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Subsequently, on similar reasoning underscoring the societal values inherent in public access to criminal proceedings, this Court held that the First Amendment provides a right of public and press access to proceedings and transcripts of voir dire in criminal cases, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 502 (1984)(*"Press-Enterprise I"*), and to adversarial preliminary hearings in criminal cases, *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)(*"Press-Enterprise II"*). *See also Waller v. Georgia*, 467 U.S. 39, 46 (1984)(defendant's Sixth Amendment right to open trial prevented total closure of suppression hearing, but in most circumstances qualified First Amendment right of access would also attach).

has explained, "[A] major purpose of the First Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The operation of the judicial system is of special concern and interest to the public under our democratic form of government. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

Thus, because the public's role in scrutinizing the operation of the judicial system, and in particular the criminal justice system, is of such importance to informed self-governance, criminal proceedings are presumed open. The presumption

> may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure was properly entered.

Press-Enterprise I, 464 U.S. at 510.

In *Globe Newspaper Co.*, this Court held repugnant to the First Amendment a Massachusetts statute automatically excluding the public and press from criminal trials during the testimony of sex offense victims under age 18. This Court stated:

> Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Globe Newspaper Co., 457 U.S. at 606-07. Four years later, this Court ruled that a California court could exclude the press and public from a preliminary hearing pursuant to a state statute "only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise II*, 478 U.S. at 14. Moreover, "The First Amendment right of access cannot be overcome by [a] conclusory assertion[.]" *Id.* at 15.[20]

Based squarely on this Court's reasoning in *Richmond Newspapers, Inc. v. Virginia*, and *Globe Newspaper Co. v. Superior Court*, reiterated and expanded in *Press-Enterprise I* and *Press-Enterprise II*, a majority of the United States Circuit Courts of Appeals have recognized a First Amendment right of access to pre-trial and post-trial court proceedings and the documents filed in connection

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[20] This Court did not limit the First Amendment right of access, and thus the applicability of the closure test, to preliminary hearings or trials. To the contrary, this Court recognized that "the vast majority of the States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings," and that while "some pretrial proceedings have no historical counterpart, . . . the traditional right of access should still apply" because of the importance of the pretrial proceeding to the criminal trial. *Press-Enterprise II*, 478 U.S. at 10 n.3 (citations omitted).

with them, including motions, rulings, and plea agreements.[21] Thus, other than grand jury proceedings, all phases of a criminal prosecution and the documents pertaining to it are presumptively open for public inspection.

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[21] As to "post-trial" proceedings, or those, such as pleas, which take the place of trial, *see Washington Post Co. v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991)(First Amendment right of access to plea agreement and related documents); *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462 (9th Cir. 1990)(First Amendment right of access to plea agreement); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986)(First Amendment right of access to plea and sentencing); *CBS, Inc. v. United States District Court*, 765 F.2d 823 (9th Cir. 1985)(First Amendment right of access to post-trial proceedings, including motion for reduction of sentence). As to pre-trial proceedings, such as bond reduction hearings and other motions, *see United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993)(First Amendment right of access to court's docket and pre-trial proceedings); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987)(First Amendment right of access to motions submitted in connection with pretrial proceedings); *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985)(First Amendment right of access to indictments, informations and bills of particulars); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985)(First Amendment right of access to voir dire and trial exhibits); *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984)(First Amendment right of access to pretrial proceedings and documents); *Associated Press v. United States*, 705 F.2d 1143 (9th Cir. 1983)(First Amendment right of access to pretrial documents, including motions); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983)(First Amendment right of access to pretrial bail reduction hearing); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982)(First Amendment right of access to voir dire and suppression hearing); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982)(First Amendment right to attend suppression hearing).

As *Globe Newspaper* and *Press-Enterprise II* indicate, state legislatures may not automatically override the protections of the First Amendment. In a case analytically apposite here, the United States Fourth Circuit Court of Appeals applied the *Press-Enterprise II* test[22] and invalidated, as offensive to the First Amendment, a lower court's closure of a plea and sentencing hearing and the documents filed in connection with it because the court had relied solely on the federal Classified Information Procedures Act and the parties' assertions of important "national security interests."[23] *In re Washington Post Co.*, 807 F.2d at 393. Again, the court did so based squarely on this Court's reasoning in *Richmond Newspapers*, *Globe*, and the *Press-Enterprise* cases. Noting that "a guilty plea serves as a substitute for trial [and] may reasonably be treated in the same manner as a trial for First Amendment purposes," the Fourth Circuit rejected the trial court's closure order because the district court had made no specific findings why closure was necessary and had engaged in no consideration of the alternatives to total closure. *In re Washington Post Co.*, 807 F.2d 389, 392-393.

The same statutorily-based "rubber stamp" of secrecy was imposed upon Respondent's criminal court file in this case. As the trial court's order itself demonstrates, *no* finding was made as to the compelling interest that

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[22] (1) Closure serves a compelling interest; (2) there is a substantial probability that in the absence of closure the compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.

[23] The defendant in this *Washington Post* case was an accused Ghanaian spy.

"necessitated" sealing Respondent's court file,[24] and no consideration of any sort was given to a less restrictive alternative to total sealing. Surely, the societal values served by accessible court records, as this Court itself has explained them, are heightened in this case, where a public official has pled *nolo contendere* to a criminal charge arising out of the conduct of her office, and no public trial, where the government's response to this conduct could be observed, ever took place. The Florida Court of Appeal's decision approving this sealing clearly conflicts with *In re Washington Post*.

II. The Florida Decision Directly Conflicts With A Decision of the United States First Circuit Court of Appeals Invalidating A Similar State Statute.

In *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), the United States Court of Appeals for the First Circuit invalidated on First Amendment grounds a state statute similar to Florida's in purpose and effect. In *Pokaski*, a newspaper challenged as repugnant to the First and Fourteenth Amendments a Massachusetts statute providing for (1) the automatic sealing of court records in criminal cases where the defendant was found not guilty or there was a finding of no probable cause, and (2) the sealing of criminal court records where charges were

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[24] Enabling a person to obtain an appointment to the United States Coast Guard can hardly be what this Court would consider a "compelling state interest," but even if there were a compelling interest in enabling Respondent to go forth in her life with an unblemished criminal record, there was no showing, and no finding to this effect made by the trial court here.

resolved by *nolle prosequi* or dismissal upon the court finding that "substantial justice would be best served."[25] Like Resha here, the petitioners in *Pokaski* sought access to certain of those court files which, unbeknownst to them and without opportunity for them to object, had been sealed automatically or by court order pursuant to this statutory scheme.

The First Circuit ruled that neither provision of the statute, and thus no sealings of court files in conformity with the statute, survived First Amendment scrutiny because, in light of the *Press-Enterprise* cases and *Globe Newspaper*, the sealing of court records cannot be justified on the basis of "generalities." To the contrary, abridgement of First Amendment access rights must be analyzed on a case-by-case basis: *each* defendant seeking sealing of his or her records must make a specific showing of the compelling interests justifying sealing, and even then, the sealing of court records cannot be broader than necessary to protect the compelling interest advanced by the former defendant. Moreover, as to those records which were sealed pursuant to the second part of the statute – requiring a showing that sealing best served "substantial justice" – the court specifically held that that standard did not necessarily equate with the showing required by this Court, but that where specific findings comporting with this Court's requirements *were* made, the records could remain sealed consistent with the United States Constitution.

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[25] Similar to the Florida statute at issue, the Massachusetts statute also provided for the withdrawal from public view of the records of probation officers.

Clearly, Respondent has *never* made the constitutionally mandated showing, and the trial court did not make any particularized findings when it sealed Respondent's criminal court file other than findings that she met the terms of the Florida statute and had filed the required paperwork. The decisions of the First Circuit and the Florida court in this case directly conflict and cannot be reconciled.[26]

The Florida decision at issue here squarely holds that the public's access rights exist only while a proceeding is on-going.[27] In other words, once a proceeding concludes, even if it concludes with a *nolo contendere* plea bargain by a public official to a reduced charge of "attempted official misconduct," any right of access the public may have had evaporates. In this respect, the Florida court's decision also directly conflicts with the First Circuit's in *Pokaski*.

As the *Pokaski* court pointed out, simply because the records were *once* open does not mean the interests protected by First Amendment are fully served. The interests described by this Court in *Richmond Newspapers, Globe,*

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[26] Moreover, as the trial court indicated here, in Florida, sealing of court files is a matter of routine, and often occurs without a hearing, simply on the basis of Fla. Stat. § 943.058 and Fla. R. Crim. P. 3.692. *See* A55-56, 58.

[27] The Florida court specifically found inapplicable to the circumstances before it a Florida Supreme Court decision, *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988), which heretofore had been understood to protect the public's right of access to court records and proceedings. The First District Court indicated that its ground for rejecting this authority in this case was that while proceedings were on-going, the court file concerning Respondent was open to public inspection. *See Resha v. Tucker*, 600 So. 2d at 18; A5-6.

and the *Press-Enterprise* cases – in sum, the contribution of openness to public assurance of the integrity of the criminal justice system – continue to exist even after a criminal proceeding has concluded:

> These interests seem clearly implicated in this age of investigative reporting and of continuing public concern over the integrity of government and its officials. Amicus cannot see any salubrious effect on a criminal proceeding produced by subsequent access to the records of that proceeding. But the present prospect of future access is a felt presence, just as the prospect of appellate review is for the lawyers and judge in the trial of a case.

Pokaski, 868 F.2d at 503-04.[28]

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[28] In rejecting the argument that once public proceedings take place in a criminal case the records of that case may be sealed without offending the First Amendment, the First Circuit observed that this concept was a "strict, harsh one, narrowly confining First Amendment interests in what might be a large problem of governance to a temporally immediate, discrete episode." *Pokaski*, 868 F.2d at 504. Moreover,

> It seems to us to contradict the insight, expressed in *Richmond Newspapers*, 448 U.S. at 572-73, 100 S.Ct. at 2825: "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." If the press is to fulfill its function of surrogate, it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously.

Id.

Further compounding the erroneous view that First Amendment access rights were not at stake here, the Florida court's decision validates the sealing of court records pursuant to the Florida statute and Rule of Criminal Procedure 3.692, even where the sealings are unsupported by findings comporting with *Press-Enterprise II*, and then places the burden of vindicating First Amendment rights wholly on the public that seeks to exercise them. Faced with a similar record, the *Pokaski* court found Massachusetts' statute constitutionally invalid in that respect. To the extent the Massachusetts statute authorized an automatic judicial sealing of records without satisfaction of First Amendment standards, and then placed the burden on the press and public to challenge the sealing, it "impermissibly burden[ed] the First Amendment." *Id.* at 507. The same is clearly true of the Florida statute as the Florida court has applied it.

In sum, the Florida court's decision in this case rejects more than a decade of decisions by this Court and the United States Circuit Courts of Appeals. Because the Florida Supreme Court has declined to rectify this outright rejection of the First Amendment as controlling authority, even in the face of conflicting decisions by the federal appellate courts, this Court's intervention is essential.

III. The Florida Court Has Decided Important Questions Of Federal Law Which Should Be Settled By This Court.

As this Court has noted time and again, the historical tradition in this Nation is one of presumptive openness of

the proceedings occurring in our criminal courts. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). This Court has extended the First Amendment's protection to trials, pre-trial proceedings and preliminary hearings, and the Circuit Courts of Appeals have extended this protection to other pre- and post-trial court proceedings and to the indictments, informations, motions, pleas or other documents which are filed with the court.[29] Because the values this Court has recognized as served by public access to court proceedings are even better served by access to court records – especially in cases where no preliminary hearing or trial ever takes place – this Court should take this opportunity to decide that the protection of the First Amendment extends to court records.[30]

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[29] As a member of the United States Circuit Court of Appeals for the Ninth Circuit, Justice Kennedy observed the lack of a "principled basis" for withholding First Amendment protection from post-trial proceedings given the justification for access to pre-trial proceedings and trials. *CBS, Inc. v. United States District Court*, 765 F.2d 823, 826 (9th Cir. 1985) ("The penal structure is the least visible, least understood, least effective part of the justice system; and each such failure is consequent from the others. Public examination, study, and comment is essential if the corrections process is to improve").

[30] *See Press Enterprise II*, 478 U.S. at 12 (observing that because California's preliminary hearing "in many cases provides 'the sole occasion for public observation of the criminal justice system,'" societal values are served by extending First Amendment access protections to it); *Gannett Co. v. DePasquale*, 443 U.S. 368, 434-435 (1979)(Blackmun, J., concurring in part and dissenting in part)(noting characteristic of most criminal justice systems across the Nation that overwhelming majority of prosecutions end in dismissals or pleas).

There is no reasoned distinction between the values underlying access to on-going proceedings and those proceedings which have concluded, especially in the criminal context. The values are nearly identical.[31] Indeed, the compelling interest most often asserted in support of closing criminal court proceedings and records – the defendant's Sixth Amendment right to a fair trial – is not even present once the case concludes. Furthermore, if as the Florida court has ruled, the mere entry of an order sealing proceedings or files based on a Florida statute and rule of procedure is sufficient to relieve the proponent of secrecy from the burden of having to demonstrate the "overriding interests" supporting closure, this Court's

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[31] To the extent [a right of access] exists, it exists today for the records of cases decided a hundred years ago as surely as it does for lawsuits now in the early stages of motions litigation. The fact that a suit has gone to judgment does not in any sense militate against the public's right to prosecute a substantiated right to see the records of a particular case. Moreover, access to court records does not involve relitigation of the underlying dispute, so the rationale behind requiring extraordinary circumstances for post-judgment intervention does not as a rule apply to access claims.

Mokhiber v. Davis, 537 A.2d 1100, 1105-06 (D. C. 1988) (concerning motion for access to court files of civil case four years after settlement and stipulated sealing). *See also Bank of America Nat. Trust & Sav. Ass'n. v. Hotel Rittenhouse Ass'n.*, 800 F.2d 339 (3d Cir. 1986)(access to settlement documents in civil suit); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985)(access to court files of concluded civil litigation).

decisions providing for public notice and an opportunity to be heard in opposition to such an order would surely be eviscerated by litigants who wish to avoid the challenge or by courts which do not discern any significant rights at stake.[32]

Official court files are repositories of the history of governmental action. Citizens depend not only on information about "what happened today" to make informed decisions about their government, its leadership, and the persons in whom public trust is otherwise reposed, but also upon information obtained and viewed from the perspective tomorrow brings. The national events of the past two decades, if nothing else, have surely served to underscore the vital role public scrutiny plays in determining the policies, direction, and leadership of the Nation.[33] Court proceedings and records, not just public trials, have played an indispensable part in the public's ability to fulfill its role in this Republic. The role the

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[32] Significantly, there is no provision of Florida law which places a time limit on when a former defendant can move for sealing of his court file or arrest records. Moreover, the order sealing Respondent's criminal court file had been entered only four months before Resha challenged it. Yet, in the Florida courts' view, the mere fact of its entry at the conclusion of the proceedings totally vitiated any claim of First Amendment rights asserted, even though Resha had a particularly personal and actual need to view the file's contents in light of his on-going lawsuit against Respondent based on the very conduct to which she pleaded *nolo contendere*.

[33] These events range from Watergate, to Abscam, to Iran-Contra, to the prosecutions of PTL founder Jim Bakker, the Bank of Credit and Commerce International (BCCI), Manuel Noriega, and beyond.

judicial system and its records have played in furthering both public understanding and public trust in government institutions cannot be so casually cast aside, as the Florida courts have done. This Court has frequently observed that public confidence in the criminal justice system is an essential component of its very existence and that public confidence is undermined by secrecy. *See, e.g., Press-Enterprise II*, 478 U.S. at 9-14.[34]

Florida's courts are applying the State's sealing and expunction statute impermissibly to abridge the public's First Amendment access rights as the federal courts have explicated them.[35] In a State where the courts perceive no limit on the number of court files a former criminal

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[34] Foreshadowing this Court's decisions, the Supreme Court of California eloquently stated a century ago:

> In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong, and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions, in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in discussion of the proceedings of public tribunals that is consistent with truth and decency, are regarded as essential to the public welfare.

In re Shortridge, 99 Cal. 526, 530-31, 34 P. 227 (1893).

[35] The State of Florida has an interest in ensuring that State statutes are interpreted and applied consistent with the United States Constitution. The Florida courts' routine reliance on Fla. Stat. § 943.058 and Fla. R. Crim. P. 3.692 to seal records makes this interest concrete and immediate.

defendant can seal, and perceive absolutely no constitutional limits on their discretion to seal criminal court files where they do so pursuant to this statute, citizens' confidence in their governmental institutions is undermined as their ability to keep watch on the activities of government is diminished. The scrutiny of this Court is requested and warranted.

Respectfully submitted,

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APPENDIX
SUPREME COURT OF FLORIDA

No. 80,228

DONALD G. RESHA, Petitioner,

v.

KATIE D. TUCKER, Respondent.

[March 11, 1993]

McDONALD, J.

Finding no express and direct conflict to support this Court's jurisdiction, the petition for review is dismissed. *See Times Publishing Co. v. Russell*, no. 79,496 (Fla. Mar. 11, 1993).

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Application for review of the decision of the District Court of Appeal – Constitutional Construction

First District – Case Nos. 92-914 & 92-945

Richard E. Johnson of Spriggs & Johnson, Tallahassee, Florida; and William A. Friedlander, Tallahassee, Florida,

for Petitioner

Brian S. Duffy of McConnaughhay, Roland, Maida, Cherr & McCranie, P.A., Tallahassee, Florida,

for Respondent

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NOS.: 92-914/945

DONALD G. RESHA
Petitioner,

v.

KATIE D. TUCKER
Respondent.

Opinion filed May 22, 1992

Petition for Writ of Certiorari, original jurisdiction.

Richard E. Johnson of Spriggs & Johnson and William A. Friedland, Tallahassee, for Petitioner.

Brian S. Duffy, Tallahassee, for Respondent/Cross Petitioner.

SMITH, J.

In these consolidated cases, Katie Tucker and Donald Resha seek certiorari review of the same order of the circuit court, partially unsealing the criminal records of Katie Tucker. We grant Tucker's petition and quash the order of the circuit court.

Katie Tucker, who was the executive director of the Florida Department of Revenue, was suspended as the result of allegations that she had abused her authority by using the machinery of government to investigate her husband's former political opponent, Donald Resha. Ultimately, she pled *nolo contendere* to the charge of attempted official misconduct, a first degree misdemeanor, and was sentenced to probation and payment of costs, with adjudication of guilt withheld.

In the meantime, Donald Resha brought two civil suits in Leon County Circuit Court; in one, Katie Tucker is the defendant, and in the other she is allegedly a key adverse witness for both parties in a negligence action brought by Resha against the State of Florida. During discovery, Resha learned that Tucker had sought and obtained an order sealing her criminal records. He filed a motion to vacate the order in Tucker's sealed criminal proceeding. The trial court ruled that the files should remain sealed, except that the attorneys of record for Donald Resha could have access to the records, reports and evidence contained in the sealed files of the Florida Department of Law Enforcement and the Florida Department of Revenue. The order permitted the attorneys for Resha to use the contents of these files in connection with Resha's civil cases, without ruling on admissibility, but other use was prohibited.

Both parties seek review of the order – Resha contending that the trial court should have unsealed Tucker's entire record and Tucker contending that Resha failed to present sufficient evidence to warrant the court's order

partially unsealing her record.[1] We agree with Tucker that as the moving party below, Resha bore the burden of proof and he failed to demonstrate under any test,[2] a basis for unsealing, even in part, Tucker's records.

The cases suggest that good cause for unsealing could be shown by demonstrating that the party who sought and obtained the sealing order (in this case Katie Tucker) did so through fraud or perjury, or that the trial court entered the sealing order through mistake or inadvertence, or maybe even that the beneficiary of the sealing order has not profited from the act of judicial grace and has been subsequently convicted of other crimes. *Russell v. Times Publishing Co.*, 17 F.L.W. D417 (Fla. 5th DCA February 7, 1992); and *Russell v. Miami Herald Publishing Co.*, 570 So.2d 979 (Fla. 2d DCA 1990) (majority and concurring opinions).

Resha did not establish that Tucker committed fraud or perjury in obtaining the sealing order. His contention that she had an adjudication of guilt or conviction contrary to section 943.058(7)(b), Florida Statutes (1989) based upon the definition of "convicted" or "conviction" in section 287.133(b), Florida Statutes (1989), a statute dealing with the denial or revocation of the right to

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[1] As a practical matter, it appears that the court's order would substantially deprive Tucker of the benefit of the original closure order.

[2] See Russell v. Miami Herald Publishing Co., 570 So.2d 979 (Fla. 2d DCA 1990) setting forth a three-prong test for a moving party seeking to unseal records, and Russell v. Times Publishing Co., 17 F.L.W. D417 (Fla. 5th DCA February 7, 1992) suggesting that a party seeking to unseal court files must demonstrate good cause for doing so.

transact business with public entities if one has been convicted of a public entity crime, is meritless, and warrants no discussion.

Next, Resha's contention that the sealing proceeding was defective because he, as a "victim," was not present or permitted to be heard is without authority. First, Resha has not demonstrated that he is a victim for purposes of the recently enacted "rights of victims" amendment to the Florida Constitution, Article I, section 16(b). Further, he has not cited any authority that a sealing proceeding is a crucial stage of a criminal proceeding within the meaning of the amendment.

Resha's contention that he will be denied access to the courts if the records are not unsealed is equally without authority or evidentiary support. Resha failed to demonstrate a compelling necessity for these records and the unavailability or lack of other means of obtaining the information sought.

Finally, Resha's contention that the trial court's order sealing Tucker's record violates the public's right to know ignores the facts and circumstances of this case. The public and press had access to the criminal proceedings against Katie Tucker. It was not until the conclusion of these proceedings that the sealing order was entered. Resha's reliance on *Barron v. Florida Freedom Newspapers,* 531 So.2d 113 (Fla. 1988) is misplaced. In *Barron,* Dempsey Barron had sought and obtained closure of his divorce proceedings. Unlike *Barron,* the criminal proceedings against Katie Tucker were not closed to the public or press.

Having otherwise failed to demonstrate a basis for unsealing Tucker's records, Resha is not entitled to have the records unsealed simply because of his status as a plaintiff in a civil action arising out of the same occurrence. *Griss v. Cardonne,* 546 So.2d 1171 (Fla. 3d DCA 1989); *Sussex Mutual Insurance Co. v. Ruiz,* 508 So.2d 424 (Fla. 3d DCA 1987); *City of West Palm Beach v. Meredith,* 473 So.2d 759 (Fla. 4th DCA 1985); and *Walton v. Turlington,* 444 So.2d 1082 (Fla. 1st DCA 1984).

Katie Tucker's petition for writ of certiorari is GRANTED. Resha's petition for writ of certiorari is DENIED.

WRIT ISSUED.

ZEHMER AND WEBSTER, JJ., CONCUR.

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 90-674-CFA

STATE OF FLORIDA,

vs.

KATIE TUCKER,
Defendant.
_____/

ORDER ON RESHA'S MOTION FOR RECONSIDERATION

THIS CAUSE came before the court on the motion filed by Donald Resha, seeking to "unseal" the files which were ordered tc be sealed by the court on October 3, 1991. The court has heard the arguments of counsel and finds that it would be inappropriate to reopen the criminal history records for public inspection or to otherwise deprive Katie Tucker of the benefits of the order which sealed her arrest records. The court also finds that it may meet this goal and still provide the parties to the civil suit with access to evidence that may be relevant in that case. Thus, the effect of this order will be to allow Tucker to continue to enjoy the benefits of having her records sealed and will allow the parties access to evidence that may have also been sealed along with the criminal history records. Other than is provided in this order, all pleadings and orders filed in the court file after October 3, 1991, will remain sealed.

The court being advised in the premises, it is ordered and adjudged as follows:

1. While the records in this case have been sealed, the court will allow the attorneys of record for Donald Resha access to any records, reports and evidence contained in the sealed files of the Florida Department of Law Enforcement and the Florida Department of Revenue. The attorneys, as officers of the court, shall not allow dissemination of any such matters to any person other than those absolutely necessary to the trial of the civil case that is now pending. In the event the attorneys disclose any such matters to any other person, the attorneys shall insure that the other person know about the prohibition of disclosure contained in this order. In the event any such matters are introduced into evidence in the civil trial, the existence of this order shall be made known to the judge in the civil case so adequate safeguards against the public dissemination of such matters may be made.

2. The attorneys for Resha, acting under authority of this order, shall sign a receipt for all originals and copies of documents, papers and things received by them, and shall return same to the official from whom received at the conclusion of the civil case, along with any copies and reproductions they may have made.

3. Other than is specifically provided in this order, the motion filed by Resha is denied.

DONE AND ORDERED this 24 day of February, 1992, at Tallahassee, Florida.

/s/ N. Sanders Sauls
CIRCUIT JUDGE

cc: Neill G. Wade
James P. Judkins
William A. Friedlander
Brian S. Duffy
Rick Johnson

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

June 30, 1992

CASE NO: 92-00914/945

Donald G. Resha, Jr. v. Katie D. Tucker

Petitioner(s), Respondent(s)

ORDER

Motion for rehearing and motion for rehearing en banc, filed June 8, 1992, is DENIED.

By order of the Court

JON WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Richard E. Johnson
James P. Judkins
Brian S. Duffy
Neil Wade

William A. Friedlander
Michael R. Ramage
Michael Ingram
N. Sanders Sauls

/s/ Laurie Black
Deputy Clerk

[SEAL]

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DONALD G. RESHA, JR.,

Petitioner/Cross-Respondent,

v.

KATIE D. TUCKER,

Respondent/Cross-Petitioner.
_____/

CASE NOS.
92-914/945

MOTION FOR REHEARING AND MOTION FOR REHEARING EN BANC

Petitioner, Donald Resha, respectfully moves the Court for a rehearing pursuant to Fla. R. App. P. 9.330, and for rehearing en banc pursuant to Fla. R. App. P. 9.331, and shows the Court as follows:

I.

MOTION FOR REHEARING

On May 22, 1992, this Court quashed an order of the Circuit Court which granted temporary limited access to Resha to certain criminal records of Tucker in the possession of the Florida Department of Law Enforcement. Resha had sought review arguing for permanent unsealing of the FDLE files and, additionally, opening of the Circuit Court file. Tucker had cross-petitioned, seeking review of the temporary partial opening of the FDLE files pertaining to her. This Court granted Tucker's cross-petition and denied Resha's petition.

The Court overlooked or misapprehended certain controlling points of law in rendering its decision for Tucker.

1. The Court reads *Barron v. Florida Freedom Newspapers*, 531 So.2d 113 (Fla. 1988), as applying only to circumstances in which the actual court proceedings were closed to the public, not to the sealed records of cases that were originally conducted in open court. Those happened to be the facts of *Barron*, but the opinion was carefully crafted to encompass a much broader range of situations.[1] Limiting *Barron* to its facts would be to eviscerate Florida's landmark case on the right of public access to court records. That the Supreme Court intended a much broader right of access is shown by the language of *Barron* itself. Petitioner can locate no federal or Florida authority which recognizes a greater right of access to records of a closed trial than to records of an open trial. Such a distinction would not further the policies behind open court records. Only a small number of people can be physically present at any given court proceeding and media attention is too whimsical and unpredictable to satisfy a constitutional guarantee of access. Court records must be equally accessible to those who are unable to attend a trial, and, indeed, to those who were not yet born at the time of the trial. This is particularly important in cases such as the instant one in which official misconduct by a high government executive using taxpayer dollars is at issue. The principle applies with stronger

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[1] The Barron court was quite explicit in this regard: "[W]e feel that a definitive statement by this Court is necessary to assist judicial officers in this sensitive area." 531 So. 2d at 118.

reason in criminal trials. Even the lone dissenter in *Barron* acknowledged as much, "because the public, in effect, is a party to criminal cases." *Id.* at 121 (McDonald, J., dissenting).

2. The Court overlooked or misapprehended a controlling point of law in assigning the burden of proof to Resha. In doing so, the Court relied on *Russell v. Miami Herald Publishing Co.*, 570 So. 2d 979 (Fla. 2d DCA 1990) and *Russell v. Times Publishing Co.*, 17 F.L.W. D417 (Fla. 5th DCA February 7, 1992). In both instances, the reliance is misplaced.

This Court cited the three-prong test for a moving party seeking to unseal records as stated in *Russell v. Miami Herald.* However, that test was a special substitute fashioned for the occasion on the explicit ground that the records had been sealed for so many years as to afford a presumption of correctness to the original sealings. The records in the instant case had been sealed only three months when Resha moved to open them immediately upon learning of the sealing. Thus, under *Russell v. Miami Herald,* the correct standard is the one mandated by the U.S. Supreme Court in *Press-Enterprise Company v. Superior Court,* 478 U.S. 1 (1986), which places the burden solely on the party seeking to maintain the sealing. 570 So. 2d 982-3.

Russell v. Times Publishing does not explicitly cite the age of the defendant's criminal records as the basis for shifting the burden to the moving party, but it does support its holding by citation to the portion of *Johnson v. State,* 336 So. 2d 93 (Fla. 1976), which held that only "the unique circumstances of the instant case" would trigger

the "good cause shown" standard for the moving party and, even then, the *Russell* court emphasized language from *Johnson* referring to "first offenders found innocent or those persons against whom criminal proceedings are dismissed," neither of which characterizations applies to Katie Tucker. Nor do either of the *Russell* cases involve misconduct on the job by a government official using taxpayer money.

The Florida Supreme Court felt so strongly about the burden of proof in *Barron* that it stressed three times (twice at 118 and once at 119) that the burden rests on the party seeking to maintain the sealing. The Supreme Court even reached out to disapprove a contrary holding in a case not before it. 531 So. 2d at 119.

3. The Court overlooked or misapprehended a controlling point of law in its treatment of Resha's contention that the constitutional policies of the United States and of the State of Florida especially disapprove actions which have the effect of concealing records of official misconduct. The Court focused on Resha's illustrative use of § 287.133(b), *Fla. Stat.*, which provides for harsher interpretation of the criminal records of those involved in public entity crimes. The Court stated that this line of reasoning "is meritless, and warrants no discussion." (Slip Op. at 4.) Such a conclusion would be on target had Resha offered that statute as the sole basis for asserting a public policy favoring a special degree of openness for records pertaining to political crimes. Resha regrets that his illustrative use of that statute was not more carefully cross-referenced to the other authorities supporting the

general policy which was the central theme of his petition. Resha concedes that § 287.133(b) is not directly on point.

However, during the pendency of this matter before this Court, the Legislature repealed § 943.058, the statute under which Tucker's records were sealed, and replaced it with a new section 943.059, which prohibits sealing a criminal record of official misconduct even if adjudication has been withheld. An enrolled and engrossed copy of this new legislation is attached hereto.[2] Though the new law is not expressly retroactive, it is a legislative effectuation of state and federal constitutional doctrines that have long been in effect. See, e.g., *Nixon v. Warner Communications*, 435 U.S. 589 (1978); *Gonzales v. State*, 565 So. 2d 410 (Fla. 3d DCA 1990).

II.

MOTION FOR REHEARING EN BANC

In support of this motion for rehearing en banc, Resha contends that the panel has created conflict with this Court's previous rulings in *State ex rel[.] Tallahassee Democrat v. Cooksey*, 371 So. 2d 207 (Fla. 1st DCA 1979), which requires public notice upon the sealing of all or part of a criminal file, and *Florida Freedom Newspapers v.*

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[2] CS/SB 120 creates Chapter 92-73, Laws of Florida, the pertinent part of which is to be codified at § 943.059, Fla. Stat. Along with certain other crimes, those covered by Chapter 839, Fla. Stat., (offenses by public officers and employees) may not be sealed upon a plea or finding of guilt, even if adjudication is withheld.

Sirmons, 508 So. 2d 462 (Fla. 1st DCA 1987), which places the burden of proof on the party seeking to obtain or preserve closure of court records.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional public importance.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court: *State ex rel[.] Tallahassee Democrat v. Cooksey*, 371 So. 2d 207 (Fla. 1st DCA 1979) and *Florida Freedom Newspapers v. Sirmons*, 508 So. 2d 462 (Fla. 1st DCA 1987).

/s/ Richard E. Johnson
Richard E. Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by U.S. Mail this 8th day of June, 1992, to Brian S. Duffy, P.O. Drawer 229, Tallahassee, Florida 32302-0229; Neill G. Wade, State Attorney's Office, Leon County Courthouse, Tallahassee, Florida 32301; and Michael R. Ramage, Florida Department of law Enforcement, P.O. Box 1489, Tallahassee, Florida 32302.

/s/ Richard E. Johnson
Richard E. Johnson

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DONALD G. RESHA, JR.,

Petitioner,

v.

KATIE D. TUCKER,

Respondent.

_____/

CASE NO.
L.T. CASE NO.
90-674-CFA

PETITION FOR REVIEW OF ORDER
SEALING COURT FILES

Pursuant to Rule 9.100(d), *Fla. R. App. P.*, Petitioner Donald G. Resha, Jr., respectfully petitions this Court for review of an order of the Circuit Court for the Second Judicial Circuit.

Petitioner seeks review of three mandates in the lower court's order:

1. The decision to maintain Katie Tucker's original criminal court file under seal.

2. The decision to seal additional portions of that file pertaining to Petitioner's efforts to unseal the original documents.

3. The decision to allow Petitioner access to certain records of the Florida Department of Law Enforcement and the Department of Revenue only under certain highly restrictive circumstances.

I. BASIS FOR INVOKING JURISDICTION.

This Court has jurisdiction to review orders sealing court records under Rule 9.100(d), *Fla. R. App. P.* The constitutional basis for jurisdiction is Art. V, § 4(B)(3), *Fla. Const.*, which permits the district courts of appeal to issue writs of certiorari.

Petitioner contends that the order of the court below constitutes a departure from the essential requirements of law and that there is no adequate remedy by appeal. The order of the court below will cause Petitioner irreparable injury because it deprives him of essential evidence needed for a civil trial scheduled to begin on May 26, 1992.

II. PERTINENT FACTS

The Governor and Cabinet suspended Defendant Katie Tucker from her position as Executive Director of the Florida Department of Revenue after an investigation by FDLE concluded that she had abused her authority by using the machinery of government to attack Resha for being a political opponent of herself and her husband. Tucker caused her employees to investigate Resha and audit his businesses and planted rumors in the Department that Resha was involved with illegal sales of drugs, guns, and pornography as well as money laundering, tax evasion, and organized crime. Investigations by the Department of Revenue and FDLE discredited these allegations, but Resha was severely damaged by them.

Defendant Tucker claimed that she had never ordered investigations or audits of Resha or his businesses and had not made the allegations. She said she had merely ordered a general review of bookstores and video shops and that others in her department had singled out Resha, investigated him, audited his businesses, and spread the defamatory allegations about him, all without her knowledge.

The Governor and Cabinet allowed her time during her suspension to produce evidence corroborating her version of events. FDLE produced extensive evidence that, during this period, Tucker fabricated, altered, and backdated documents to support her story. FDLE arrested her for fabricating one of the documents, thereby giving rise to the instant case in which Tucker pled nolo contendere and was sentenced to a term of probation and payment of costs.

Discovery in Resha's civil suit against Tucker was held in abeyance pending resolution of the instant criminal case. Following other delays, Resha's attorneys deposed Tucker on September 4-5, 1991. At that deposition, Tucker refused to answer certain questions about the instant case. She was informed at that time that a motion to compel her to answer would be forthcoming. Resha moved to compel answers and, at a hearing on the morning of December 31, 1991, Judge Kevin Davey, also of the Second Judicial Circuit, ordered her to answer. That afternoon, Tucker's civil attorney, Brian Duffy, learned for the first time that she had got her criminal attorney, Jimmy Judkins, to obtain the sealing of the instant case file on October 3, 1991. Mr. Duffy related these events to Judge Davey in a letter of December 31, 1991, and submitted a

supplemental memorandum arguing that Judge Sauls' sealing of this record protected Tucker from obeying Judge Davey's order of that morning. (App. F.) In a letter of January 2, 1992, Judge Davey stood by his order, though he noted that the material discovered may be ultimately deemed inadmissible. (App. E.)

On January 6, 1992, Resha moved to unseal Tucker's criminal court file, citing his rights as a victim of crime, his right to evidence as a litigant, Tucker's ineligibility for the original sealing, and his right as a citizen to access to public records of official misconduct. (App. D.)

Tucker's opposition to the unsealing motion was filed on January 20, 1992. (App. C.)

Judge Sauls held a hearing on January 27, 1992, at which he denied Resha's motion except for certain limited access to FDLE documents and physical evidence leading up to Tucker's arrest. (App. B.) Those holdings were entered into a written order issued on February 24, 1992. (App. A.)

III. NATURE OF THE RELIEF SOUGHT.

Petitioner respectfully requests the following relief from this honorable Court:

1. That this matter be expedited on the Court's calendar so that Petitioner may have relief prior to trial of his civil case, which is set to begin on May 26, 1992.

2. That the sealing of the criminal file of Katie Tucker be declared void *ab initio.*

3. That Petitioner be declared a victim of the crime of Katie Tucker with all rights and privileges pertaining thereto under the constitution and statutes of Florida.

* * *

THE LOWER COURT'S ORDER VIOLATES THE PUBLIC'S RIGHT TO KNOW.

The 1988 amendment to § 943.058, *Florida Statutes*, creates judicial discretion in sealing a criminal file. However, that discretion is not exercised in a vacuum. It is subject to strictures, designed to protect the public's right of access to public records, which are constitutional in nature.

The controlling authority is *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988). There the Florida Supreme Court unsealed the divorce records of a former Florida Senate president and set forth the law of access to judicial records.

> At the outset, we hold that both civil and *criminal* court proceedings in Florida are public events and adhere to the well established common law right of access to court proceedings and *records*.

Id. at 116 (emphasis added).

Citing numerous federal and state cases, the Florida Supreme Court grounded this right in the First and Fourteenth Amendments to the U.S. Constitution, thus overriding any statutes or other authority to the contrary. *Id.* Statutes furthering compelling state interests may afford

certain exceptions such as adoptions and juvenile proceedings. *Id.* at 119. In some circumstances, a countervailing privacy right may allow closure,

> However, a privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individual seeking closure.

Id. at 118.

Plainly, Executive Director of the Florida Department of Revenue is a position of public trust and the falsification of that department's official records for the purpose of personal benefit to the offender and injury to an innocent political opponent are matters of most grave continuing concern to the public and even to future generations.

Indeed, throughout the statutes and case law on official secrecy, one finds misconduct by government officials to be treated as a special category of offense for which secrecy is especially disfavored. *Nixon v. Warner Communications,* 435 U.S. 589 (1978); *New York Times v. U.S.,* 403 U.S. 713 (1971). Such a principle is essential to democracy. The First Amendment stands at its very apex when it protects the right of the public to know how its tax dollars are spent and what its officials are doing on the job. *New York Times v. Sullivan,* 376 U.S. 254 (1964). Without this information the right to restrain government at the ballot box or in the courts is meaningless. Accordingly, the right to obtain information about official misconduct is qualitatively different from and superior to the right to know about every brush a private citizen has with the law.

Standing to challenge such a closure of court records is available to any member of the public or the media. *Id.* Moreover,

> [T]he party seeking closure continues to have the burden to justify closure. This heavy burden is placed on the party seeking closure not only because of the strong presumption of openness but also because those challenging the order will generally have little or no knowledge of the specific grounds requiring closure.

Id. at 118-9.

One may scan the record of this case in vain for any burden, "very heavy" or otherwise, that this Defendant was asked to meet. Her sealing was handled as routinely as a teenager's first minor brush with the law.

The Florida Supreme Court recognized a federal constitutional limitation on the sealing of court records in *Barron, supra,* 531 So. 2d at 116. With specific regard to Florida's criminal record sealing statute, the Second District Court of Appeal has also recognized federal constitutional rights that sharply limit the statute's application:

> We determine today that in order for section 943.058 to be constitutional, the court must apply the three-pronged test which the United States Supreme Court enunciated in *Press-Enterprise v. Superior Court of California, County of Riverside,* 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed. 1 (1986) when considering a closure of court records. The supreme court ruled that when a right of access attaches to a proceeding, closure can be ordered if (1) closure serves a compelling interest; (2) there is a "substantial probability" that, in the absence of closure, that compelling

> interest would be harmed; and (3) there are not alternatives to closure that would adequately protect that compelling interest. 106. S.Ct. at 2743.

Russell v. Miami Herald, 570 So. 2d 979, 983 (Fla. 2d DCA 1990).

Tucker can not meet this test. She has not even attempted to assert a compelling state interest in sealing her records. Generally, such an interest involves protection of a countervailing Sixth Amendment right to a fair trial or protection of children involved in adoption, abuse, or juvenile proceedings. Petitioner can locate no case, state or federal, in which any interest has been found to outweigh the right of access to government records of official misconduct in a position of public trust. Certainly, the interest in sparing embarrassment to a corrupt official or aiding her career does not weigh heavily. The other two prongs of the test depend on satisfaction of the first, so Tucker fails them a priori.

The *Russell* court fashioned a milder test for records that have been sealed for so long a time as to create a presumption of correctness for the sealing. *Id.* There the records had been sealed for six, eight, and ten years. *Id.* at 980. In the instant case, Tucker got her records sealed on October 3, 1991, and kept the sealing secret even from her civil attorney until a court ordered her to comply with discovery on December 31, 1991. Resha moved to open the records on January 6, 1992. Thus the records had been sealed only about three months when Resha challenged the sealing immediately upon learning of it. There can be no presumption of correctness arising from passage of

such a short time, especially when the records were improperly sealed in the first place.

However, even under the lesser test, Tucker's records must be opened because the public interest is plainly harmed by closure. *Id.* at 983. With the court file sealed, neither Resha nor any other citizen can even verify that Tucker fulfilled the terms of the probation to which she was sentenced or paid the costs assessed against her. Tucker is free to deny ever having been arrested or sentenced, even for purposes of obtaining another high government post or perpetrating a fraud on a civil jury. Legislators or citizens seeking to promote reforms to prevent similar abuses are deprived of information essential to that task.

The special status of persons in positions of public trust has attained judicial recognition in the application of Florida's criminal record sealing statute. A mere rank-and-file Miami fire fighter has been denied a sealing of his record for purchasing illegal drugs on his own time simply because of his official position.

> [T]he public places its trust in fire fighters who at any given moment may be called to render assistance in a life threatening situation. For the public safety, there is a compelling interest in knowing the character of the public employees who serve the community. This is especially true where, as here, a fire fighter has pled nolo contendere to cocaine charges.

Gonzales v. State, 565 So. 2d 410 (Fla. 3d DCA 1990).

This analysis must apply with stronger reason to Tucker. She committed her offense in her office and in her

official capacity. Her former position as executive director of the Florida Department of Revenue is a much higher position of public trust than that of a municipal fire fighter. So, too, is her present position as a commander in the U.S. Coast Guard.

This Court itself has mandated a public notice requirement as a precondition to sealing of court files, even in circumstances more urgent than those attendant to Tucker's case:

> In the future, however, when a trial court enters an order sealing a court file (or portion thereof), it should direct the clerk to forthwith post a copy of the court's order on the bulletin board of or the front door of the courthouse for a period of 15 days following its rendition. Such will constitute adequate notice to interested parties should they desire to move for reconsideration as did petitioners here.

State ex rel. Tallahassee Democrat v. Cooksey, 371 So. 2d 207 (Fla. 1st DCA 1979).

No such notice was posted for the sealing of Tucker's file, nor was Resha accorded his right to individual notice as a victim of her crime.

The court below did not stop with reaffirming its prior sealing of the court file. In its order of February 24, 1992, the court below sealed additional documents:

> Other than is provided in this order, all pleadings and orders filed in the court file after October 3, 1991, will remain sealed.

(App. A, 1.)

At present, these documents consist of:

1. Resha's motion of January 6, 1992, to unseal Tucker's file (App. D).

2. Tucker's opposition of January 20, 1992, to Resha's motion (App. C).

3. A transcript of a hearing of January 27, 1992, before the Honorable N. Sanders Sauls (App. B).

4. The court's order of February 24, 1992, denying the motion to open the records (App. A).

There is no legal basis for this ruling. None of these documents contain reproductions of the information in the sealed file. Other than a single transcript reference to the fact that Tucker has used the benefits of the statute in her career, which could have been heard by anyone in the courtroom, all of the information in these documents could be gleaned from newspaper accounts or from the open files of either of the two civil suits Resha has pending against Tucker and against the State of Florida. Sealing these additional documents imposes a cloak of secrecy not only over the arrest and sentencing but over the fact that the original sealing was ever challenged. It also means that even the instant Petition is sealed. The public is in the dark not only about the content of the records, but also about the existence of a controversial decision by a Circuit Judge. A court may conceal some of its inner processes from public scrutiny, but not its orders nor the outcome of its decisions. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

The lower court has additionally placed strictures on Petitioner's counsel with regard to dissemination of the

content of documents in FDLE files related to Tucker's arrest. (App. A, 2.) Petitioner sought access to FDLE's files for the sole purpose of obtaining original documents to introduce in evidence at a civil trial. The original documents were needed not only because of the best evidence rule, but because a key element of the case is that certain documents are forgeries. Petitioner and his counsel were already in possession of photocopies of the FDLE files, as are all the major media outlets in Florida and most high officials in state government. These photocopies were obtained prior to the sealing order and have been widely disseminated over the past two years. Petitioner's counsel came into possession of these documents at a time when they were public records. Petitioner's counsel gained no privileged access as officers of the court.

The court's ruling with respect to the information in the FDLE files places Petitioner and his counsel under a gag that does not apply to any of the literally hundreds of other persons who have access to photocopies of the FDLE files regarding the arrest of Katie Tucker. In so ruling, the court below has run afoul of the well settled doctrines articulated by the U.S. Supreme Court and the Florida Supreme Court that no unit of government may restrict or prohibit citizens from disseminating information they have lawfully obtained. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cape Publications v. Hitchner*, 549 So. 2d 1374 (Fla. 1989).

Katie Tucker's tenure at the Department of Revenue embodied a number of seminal events in the history of Florida government. These events are of interest not only to historians and political scientists, but to those who

seek to establish mechanisms to prevent such abuses in the future. A sealing of criminal records may pass constitutional muster in many cases, but not when the statute is applied to events of great public importance involving misconduct by a high official. This is especially so when the sealing is of no legitimate benefit to the offender and is of significant detriment to the victim and to the public at large.

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32302-0229; Michael E. Ingram, Assistant Attorney General, Suite 1502 – The Capitol, Tallahassee, Florida 32399-1050; and the Honorable N. Sanders Sauls, Leon County Courthouse, Tallahassee, Florida 32301.

/s/ Richard E. Johnson
Richard E. Johnson

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

DONALD G. RESHA, JR.,

Appellant/
Petitioner,

vs.

KATIE D. TUCKER,

Appellee/
Respondent.
_____/

CASE NOS.: 92-914
92-945

TUCKER'S RESPONSE TO PETITION AND CROSS ARGUMENTS

Katie D. Tucker, appellee/respondent, responds to the petition for writ of certiorari and makes her arguments in support of her cross review.

* * *

The public is not interested.

As Resha's lawyer concedes, "the major media outlets in Florida and most high officials in state government" have copies of the now sealed records.[5] Resha is a plaintiff with nothing more than a private purpose; he is neither a journalist nor an historian with an ostensible public purpose.

Unlike the situation in *Barron v. Florida Freedom Newspapers*, 531 So.2d 113 (Fla. 1988), the proceedings here

[5] Resha's Petition, page 21.

were open to the public, the press, and Resha. There was no closure order and everyone had an opportunity to see the criminal justice system dispose of another case. Long after the cameras ceased flashing and the defendant had left her position of public office with the State of Florida, the trial court rightly sealed her criminal records. Dempsey Barron, however, was able to keep the press from observing his dissolution of marriage proceedings, until the Florida Supreme Court fashioned a test and concluded that Barron's interests were outweighed by those of the public. By its own terms, that test does not even reach the issues raised here because "the presumption of openness continues throughout the appellate review process." 531 So.2d at 118. Resha is entitled to no presumption of openness after the criminal proceedings are concluded.

B. Cross Review Argument

The trial court unsealed the Florida Department of Law Enforcement's files pertaining to Tucker without any evidentiary basis for doing so. Resha failed to plead or prove good cause for unsealing those records. *Russell v. Times Publishing Company,* 17 FLW D417 (Fla. 5th DCA February 7, 1992) (requiring an evidentiary showing of good cause to unseal criminal records).

The trial court's order, wholly unsupported by evidence, will operate to invade Tucker's constitutional right

to privacy.[6] Art.I, § 23, Fla. Const. *Russell,* 17 FLW at D418, n.2.

Resha is not entitled to access to the sealed criminal records of Tucker for use in his civil case because those sealed records are not discoverable. Resha may discover the events by other means. *Griss v. Cardonne,* 546 So.2d 1171 (Fla. 3d DCA 1989) (granting petition seeking a writ of prohibition to vacate an order unsealing criminal records for use in a civil action arising out of the same circumstances); *Walton v. Turlington,* 444 So.2d 1082 (Fla. 1st DCA 1984); *City of West Palm Beach v. Meredith,* 473 So.2d 759 (Fla. 4th DCA 1985); *Sussex Mutual Ins. Co. v. Ruiz,* 508 So.2d 424 (Fla. 3d DCA 1987).

Conclusion

Resha succeeded in drawing the trial court into error. Resha ought not be allowed access to criminal investigative files that the trial court had earlier sealed. The trial court departed from the essential requirements of law by unsealing those records at all, and departed more widely by acting without factual foundation.

Resha has no factual record upon which to assert that the trial court departed from the essential requirements of law in denying him access to the court's file.

Tucker requests that this Court: declare that the court files should continue to remain sealed; direct that the

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[6] The arguments below were made on January 27, 1992 (Appendix B to Resha's Petition), before *Russell* was decided; the invasion of privacy argument was not directly raised below.

Department of Law Enforcement files pertaining to Tucker be resealed; deny Resha's petition; and grant Tucker's cross-petition.

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IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

DONALD G. RESHA, JR. CASE NOS. 92-914
92-945

Petitioner,

v.

KATIE TUCKER,

Respondent.

_____/

PETITIONER'S REPLY

Petitioner Donald G. Resha, Jr., pursuant to this Court's Order of March 30, 1992, submits his Reply to Respondent Tucker's Response and makes further argument in support of his Petition.

I. RESPONDENT'S EVIDENTIARY ARGUMENT IS CIRCULAR.

Tucker argues that Resha is not eligible for relief from this Court because he presented only legal argument without factual evidence to the court below. This is a rather obvious example of bootstrapping by which Tucker creates her own "Catch-22." Tucker got the lower court to seal her criminal files. Pertinent evidence is in the sealed files. Resha therefore can't present the information to which he is denied access, so now Tucker argues that Resha can't get the information because he doesn't already have it. The tautology is plain: the records can't be unsealed because they are sealed.

Respondent's reliance on *Russell v. Times Publishing Company*, 17 FLW D417 (Fla. 5th DCA February 7, 1992) for this proposition is misplaced in several respects.

A. RESPONDENT BEARS THE BURDEN.

The Florida Supreme Court anticipated the logical absurdity of requiring a litigant to know and prove the contents of sealed files as a precondition to bringing an action to open them. The Supreme Court provided a path out of this conundrum by placing the "heavy burden" of justifying the sealing on the party favoring closure:

> [T]he party seeking closure continues to have the burden to justify closure. This heavy burden is placed on the party seeking closure not only because of the strong presumption of openness but also because those challenging the order will generally have little or no knowledge of the specific grounds requiring closure.

Barron v. Florida Freedom Newspapers, 531 So. 2d 113, 118-9 (Fla. 1988).

B. THE FACTS ARE UNDISPUTED.

Russell does not stand for the proposition that an evidentiary showing of good cause is necessary in every case seeking to open a sealed criminal file. The 5th DCA held that an evidentiary showing was necessary in that case, not all cases. Pleading requirements and evidentiary showings were distinguished as follows:

> In the instant case, there was no good cause pled and no evidence offered.

Id. at D418. In *this* instant case, good cause was pled before the lower court. (Petitioner's Appendix D.) No sworn testimony was presented because no facts were in dispute. Resha's motion before the lower court pled about two pages of facts. *Id.* at 3-4. Tucker's response in the lower court (Petitioner's Appendix C) did not contest even one of Resha's facts, nor did her counsel's oral argument at the hearing (Petitioner's Appendix B). The only pertinent facts missing were those in the sealed files, which Resha obviously could not introduce.

C. THIS CASE INVOLVES OFFICIAL MISCONDUCT.

The *Russell* case did not involve a public official whose criminal file was created as a result of misconduct in public office. However newsworthy the conduct of the appellant in *Russell* may have been, it still involved only a private citizen operating a private charity with private funds. Tucker was and is a high government official who committed crimes on state time in a state building with taxpayers' money. These circumstances bring into play an entirely different body of law as shown in Resha's Petition at pp.14-22, and *infra*.

D. RESPONDENT MISREPRESENTS PETITIONER'S ARGUMENT.

Tucker seriously misrepresents Resha's position in this section of her Response. Tucker claims at pages 2-3 that Resha's Petition to this Court admits that he already has the documents he seeks to unseal. This claim is simply incorrect. Petitioner has challenged the sealing of three categories of documents:

1. The original court file of Tucker's arrest, sentencing, cost assessments and probation.

2. Additional portions of the court file relating to Resha's efforts to open the older portions of the file.

3. Documents in the files of the Florida Department of Law Enforcement.

Resha obviously has copies of the second category, but is not free to circulate them. Photocopies of the third category were widely circulated before they were sealed, but they probably can not be used as evidence in a civil case where forgery is an issue, which is the reason for seeking the originals. Neither Resha nor his counsel has ever even seen the first category of documents.

The portions of Resha's Petition quoted by Tucker argued that the lower court's sealing is pointless because of the general availability of copies of some of the documents. This language applied only to the second and third categories of sealed documents. Those passages can not be read as applying to the first category of documents and it is poor appellate practice for Respondent to pluck these quotations from a surrounding context which clearly shows a meaning opposite from that represented by Tucker.

* * *

III. TUCKER HAS NO PRIVACY RIGHT IN THE SEALED FILES.

Tucker relies solely on the authority of *Russell v. Times Publishing Company*, 17 FLW D417 (Fla. 5th DCA

February 7, 1992), for the proposition that opening her criminal files would violate her right to privacy under Article I, § 23, *Florida Constitution*. This reliance is wholly misplaced.

In the first place, the *Russell* court did not decide that issue. The complete treatment of it is as follows:

> Neither party in their brief nor in their oral presentation discussed the Florida constitutional right to privacy. Although the right yields to public records disclosure, does it attach to those records once public but now sealed?

Russell, 17 FLW at D418, n.3. The quoted matter is simply a question, not the holding that Tucker represents it to be.

Moreover, as Resha has argued in the court below and before this Court, the question has already been answered by the Florida Supreme Court with respect to the conduct of government officials. The Supreme Court noted a theoretical possibility that Florida's constitutional right to privacy might call for closure of some judicial records, but hastened to add the following:

> However, a privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individual seeking closure.

Barron v. Florida Freedom Newspapers, 531 So. 2d 113, 118 (Fla. 1988).

This may or may not be the law for the records of private individuals. For this case, however, it is squarely on point and precisely controlling. Though Petitioner has

offered much more, this holding, standing alone, is dispositive of this case.

Respectfully submitted,

/s/ Richard E. Johnson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by U.S. Mail this 20th day of April, 1992, to James P. Judkins, P.O. Box 10368, Tallahassee, Florida 32302-2638; Neill G. Wade, State Attorney's Office, Leon County Courthouse, Tallahassee, Florida 32301; Michael R. Ramage, Florida Department of Law Enforcement, P.O. Box 1489, Tallahassee, Florida 32302; Brian S. Duffy, P.O. Drawer 229, Tallahassee, Florida 32302; and Michael E. Ingram, Assistant Attorney General, Suite 1502, The Capitol, Tallahassee, Florida 32399-1050.

/s/ Richard E. Johnson
Richard E. Johnson

IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL
CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

CASE NO: 90-674

STATE OF FLORIDA,
vs.
KATIE TUCKER,
Defendant.

PROCEEDING: Motion To Vacate Order Sealing Records

DATE: January 27, 1992

JUDGE: HONORABLE N. SANDERS SAULS
Circuit Judge

LOCATION: Leon County Courthouse
Tallahassee, Florida 32301

REPORTED BY: JUDY W. HUSSEY, C.S.R.
Official Court Reporter
Leon County Courthouse
Tallahassee, Florida 32301
(904) 487-3062

APPEARANCES:

For the State of Florida:

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For the Defendant/Katie Tucker:

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For Mr. Resha:

RICHARD E. JOHNSON, Esquire
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Tallahassee, Florida 32301

WILLIAM FRIEDLANDER, Esquire

MR. WADE: Judge, that's State vs. Katie Tucker, 90-674. You have before you a motion to vacate a previous order sealing the records in this cause. There are lawyers here on behalf of the defendant in the criminal case, Mr. Judkins; and Brian Duffy is here on behalf of Ms. Tucker in a related civil case; and then Mr. Friedlander and Johnson on behalf of the movant, Mr. Donald Resha.

THE COURT: All right. Let's see, I've received your motion. This was Mr. Friedlander's and Mr. Johnson's motion. And then I received a response from Mr. Duffy. All right. Then let's go ahead. Do you have all the appearances, Ms. Court Reporter?

Let's make sure. That's Mr. Richard Johnson there, Mr. William Friedlander –

MR. FRIEDLANDER: Bill Friedlander for, I guess in this case, we represent Resha as well as an entity –

THE COURT: All right. And then Mr. Brian Duffy. And Mr. Duffy represents – who do you represent?

MR. DUFFY: Katie Tucker, Your Honor.

THE COURT: All right. And then Mr. Jimmy Judkins represents who?

MR. JUDKINS: Katie Tucker, Your Honor.

THE COURT: All right. And last, but not least, Mr. Neill Wade, the State Attorney. All right. Anybody else? Okay. How do you wish to proceed? It's your motion, Mr. Johnson.

MR. JOHNSON: May it please the Court? It's never an easy matter to come before a judge and ask for an order to be vacated. And it's one of the things that lawyers least like to do, and I think that vacating orders is one of the things that judges least like to do. I think there are some extraordinary circumstances here. I think the Court was snookered into entering this order sealing the criminal record, and I think that if the circumstances had been known that this order might not have been entered.

I think that the means by which it was obtained were somewhat devious, and that the consequences of entering it were not known at the time. And it was on that basis that we come before you now asking for the order to be vacated.

There had been some question about the standing of a non-party to intervene in a criminal proceeding and I want to address that at the outset. In my memorandum, I made a citation to Florida Freedom Newspapers vs. Bar[r]on, and in that case the Florida Supreme Court gave a specific grant of standing to any member of the public or the news media to challenge the sealing of any order.

Now there has also been a question about – well, let me finish the standard. Russell vs. Miami Herald, which Mr. Duffy cited in his memorandum, is an example whereby the standing issue was resolved in the Second District Court of Appeal and it was held that the criminal proceeding itself is the proper place to bring the motion rather than to bring an independent action, although one concurring judge expressed some misgivings about that.

We also have standing under Article I, Section 16 of the Florida Constitution, which is the victim's rights provision, which grants victims the right to be informed, to be present, and to be heard at every crucial stage of the criminal proceeding.

We also have standing under Article I, Section 21 of the Constitution of Florida, and in the 14th Amendment to the United States under access to court[ ]s doctrines. And what we're raising under access to court[ ]s is the right to have the evidence that is necessary to make the access to court[ ]s meaningful, and the sealing order deprives us of that access.

We have a specific grant of jurisdiction over this matter that is in the sealing statute itself. In [sic] Section 943.058(2) specifically grants the Court jurisdiction to

open whatever records it has sealed. Russell, cited previously, Russell vs. Miami Herald, also establishes the jurisdiction.

I would also like to point out that we have a long standing American and Florida Jurisprudentia[l] doctrine of abstention and comity, which would support this Court, rather than some other Court, having jurisdiction over this matter. Already we have a situation where the defendant in this case has attempted to put two judges in the same court into collision with each other. And more recently, we've had a suggestion that still a third judge should be brought into this, that we should file a separate suit and take the chance of the rotation on which judge would hear it.

That is inconsistent with all of the case law we have, and it's certainly inconsistent with efficient management and judicial abstention and comity. I think that Mr. Duffy may have confused the doctrine of comity with the doctrine of comedy. We would have sort of a keystone cop situation if we had three different courts ruling on different pieces of this all at the same time.

The burden of proof on the necessity of sealing a file was established in Bar[r]on vs. Florida Freedom Newspapers, it states it's a very heavy burden and that it rests upon the shoulders of the party seeking the sealing. All of the case law that I could find, starting with the controlling case, which is Bar[r]on vs. – Florida Freedom Newspapers vs. Bar[r]on, makes a special exception for sealing records that implicate matters of great public interest, or, which concern in any way a person who holds a position of public trust.

Now Ms. Tucker was the Executive Director of the Florida Department of Revenue at the time that she was arrested. She was under suspension from that post, but I believe she still formally held it.

Subsequent to that, she has gone into active service as a Commander in the United States Coast Guard. This is a very high ranking position in the nation's military. And the Executive Director position of the Florida Department of Revenue is perhaps the highest non-elected post in the executive branch of Florida gover[n]ment. So I don't think there can be any legitimate question but that what we are dealing with here is somebody who occupies a position of public trust.

As far as there being public interest, I think that the falsification and the fabrication of important records of the Florida Department of Revenue is a matter of considerable public interest to historians, to political scientists, to journalists, to the Legislature which may want to develop statutes to prevent similar abuses from happening, to administrative rule makers, just to members of the general public who may want to know how a rogue elephant executive director can get control of a department and use it so abusively.

In Gonzales vs. State – I want to make reference to a couple of cases that are not cited in either of the memoranda, and I have copy for opposing counsel and for the Court. May I approach and proceed with that, Your Honor?

THE COURT: Yes, sir.

MR. JOHNSON: Thank you, Your Honor. Gonzales vs. State, which is found at 565 So.2d. 410, Florida Third D.C.A[.], 1990. In that case, some fireman, which is not a very high position compared with a Commander in the Coast Guard or the Executive Director of the Florida Department of Revenue, was held to occupy a position of public trust, such that it would be inappropriate to grant a sealing of his criminal file.

All he was was a fireman. He was, you know, not very high up in the ladder of government. And his offense had nothing to do with his official job or his role in working for the fire department. It was completely an off duty matter involving some drug use.

Ms. Tucker, by contrast, is a much higher official. And not only that, but her offense occurred right there in the Executive Director's Office on state property in the course of performing a state function was the crime that she committed.

Also, I've provided just now a copy of State ex. rel. Tallahassee Democrat vs. Cooksey, which was a case arising out of this very court. It's at 371 So.2d.207, Florida First D.C.A[.], 1979. And in that case, Judge Cooksey, formerly of this court, had sealed some records in a murder case. The Tallahassee Democrat took it up to the First D.C.A. and the First D.C.A. said that there should at least be an opportunity – there should at least be some notice so that anyone who wants to challenge the sealing should do it.

They said that somewhere on the door of the Leon County Courthouse, or on the bulletin board of the Leon County Courthouse, there should be some kind of a

notice posted fifteen days before the file is sealed so that those who want to seal it – who want to challenge the sealing would have an opportunity to come forward.

I would also like to call attention to the rehabilitative purpose of the expunction and sealing statute that is at Section 943.058, Florida Statutes. That statute is designed to give a fresh start to somebody who is either essentially innocent or misguided and is a one-time offender, has an otherwise outstanding or exemplary record and so forth.

The means by which that can be abused, I think, are evident in the explosion [of] publicity that has occurred in the last couple of days about the serious abuse of the expunction and sealing statute in the Tampa Bay area. It's in all the – two days in a row it's the top headline. And the Legislature is obviously going to be taking a look at the ways that defendants can have that abused.

Ms. Tucker had a long history of political misconduct before it ever rose to a level serious enough to arrest her. And after she was arrested, the statewide grand jury came down with just a brutally extending [sic] condemnation of other conduct of hers in the course of her employment at the Department of Revenue and they indicated that they would have been pleased to indict her but for the fact that there was a glitch in the statute that hadn't been fixed that prevented them from doing that.

I think the fact that Ms. Tucker continues to make false statements under oath in the civil case that is going on against her, the fact that she went around behind the back of her civil lawyer and got her criminal lawyer to come in, without the knowledge of her civil lawyer, and get this file sealed, and thereby tried to put two judges of

this court on a collision course with each other, indicates that she's still practicing this kind of devious and manipulative and behind-the-scenes sort of maneuvering that shows no sense of rehabilitation, that shows no sense of contrition or regret of any sort, that shows no intention to make a fresh start in life or mend her ways.

And the consequences of this are not only for the court file, but the court order also seals the FDLE file. Now that FDLE file is particularly necessary for my client. It's also necessary for any number of other agencies of state government, because in that FDLE file are all the original documents.

Now this case that we have before Judge Davey is largely – one of the four counts of it at least – is about the falsification and fabrication of public records. Now there are going to be all kinds of best evidence rule problems in a case where the issue itself is which documents are real and which ones are forged and altered.

The originals all exist in the FDLE file. We can't get access to them now. The FDLE file is sealed. The physical evidence, the typewriter tape that proved that Ms. Tucker fabricated the records is in the custody of FDLE and is part of the file of this case. The fingerprint evidence which showed that she committed this crime is in the FDLE file. The physical evidence of the impression of her initials coming through on another sheet of paper is [sic] shown through graphite enhancement is all in the FDLE lab as part of the FDLE case file. We have no access to that. Nor does anybody who wants to remedy this situation in the Department of Revenue, in the Cabinet, in the

Legislature. This is closed, to all intents and purposes, to anybody who needs it.

Not only that, I think that Ms. Tucker should be estopped from having the FDLE files sealed, from making a motion to do that. In the civil case that we have going on, Resha vs. Tucker, we entered into a joint stipulation with Thomas Maida, who is another attorney for Ms. Tucker from Mr. Duffy's firm, that that evidence would be preserved for this trial.

And now we find out Ms. Tucker, going around behind everyone's back, and having that file sealed. So, in effect, if Ms. Tucker had never been arrested, had never been brought into criminal court, all the FDLE files showing all of her misconduct would be available to us. All those documents, all that physical evidence would be there and we could use it in our civil case.

But now, ironically, because what she did was bad enough to get arrested for, and bad enough to be sentenced to probation, required to pay FDLE $3000 for their investigation, required to this court five hundred dollars for its costs, we can't get it. It's an ironic conclusion that somebody who had committed a lesser crime would not have the opportunity to exclude it from evidence of a victim – for a victim to use in a civil suit, but somebody who commits the greater crime can have the files sealed and thereby profit and benefit from the wrongdoing. Nothing further, Your Honor.

THE COURT: All right.

MR. FRIEDLANDER: If I may, Your Honor? From a practical standpoint – I'll be trying the case for

Resha along with Rick. From a practical standpoint, if we are frozen away from – frozen out from using the files that are held at the FDLE, or the files in this court, or the files at the Department of Revenue, we can't prosecute the case, because Katie Tucker, like some other people I've known in my life, would lie when the truth would do.

It is impossible to get her to admit that she did any of the things that she clearly did, according to the FDLE. The only way to prove that she has done those things is by going through the analysis that Inspector Gordy went through when he had the information filed against her. And that analysis involved a description to the jury of a series of documents and tests that were undertaken by the FDLE. You've got to stand there and show –

THE COURT: Aren't those people still available?

MR. FRIEDLANDER: The people that did the tests?

THE COURT: Yes, sir.

MR. FRIEDLANDER: Some are and so [sic] aren't, Your Honor. But the tests are in the file. The tests [sic] results are in the file. The original typewriter ribbon, as he says, are [sic] in the file. And then if you go back to the first half of the case, much of the case against Katie Tucker comes from documents that went back and forth between and among the officials of the Department of Revenue.

I don't know, but I assume that those have found their way into the criminal files as well and that those are now sealed. As a result of that, it puts her at a great

advantage when litigating against us at the time of trial. This closure statute that was created by the Legislature did have a good purpose and I think when used properly it comes up with a good result. But Katie Tucker is not the person that it was aimed at.

It was aimed at the first offender in a typical misdemeanor, and in some cases felony cases. Four judges in Hillsborough County are now close to indictment, Your Honor, because of their having sealed files of some of their former maffia [sic] clients. And what the St. Pete Times says, and what I say is this: This statute was not created for the purpose of helping maffia [sic] chiefs to avoid publicity and it wasn't created for the purpose of having people like Katie Tucker avoid publicity. It may have been created for the purpose of helping some of these fellows that you had sitting on the bench over here earlier avoid publicity and to get a fresh start but it certainly wasn't aimed at Katie Tucker.

And as Rick said, the very fact that she has used it in a manipulative manner some three months before the commencement of her civil trial, to have a criminal lawyer come around and behind us and before this court – and I'm sure, Your Honor, I am sure that you knew nothing of our trial strategy with respect to the civil action, or that it was pending or that it was about to come to trial approximately 90 days after you entered the sealing order. I'm sure that you would have come up with a different result. But they didn't tell you about that, and they intentionally brought a different lawyer.

They brought a lawyer who didn't know about the civil stipulation. They brought a lawyer that didn't know

that we were relying heavily on the documents in the possession of the FDLE to make our case. That, in and of itself, shows that she's not entitled to the benefits of the statute.

THE COURT: All right, sir. Then let me hear from, I guess Mr. Judkins?

MR. JUDKINS: What bothers me is not that these lawyers have come in here and made an attempt to unseal the records, it's the way they're doing it, Judge. They have, I guess, accused me, Mr. Duffy, Ms. Tucker of being devious – using devious means to get records sealed, of snookering the Court. I'm pretty much outraged by this. What we did in this case, and let me refresh your memory –

THE COURT: Well, I'm looking at the file.

MR. JUDKINS: Well it's sealed.

THE COURT: Well I can look at it. I've done it. I'm looking at it right now and I see when the petition was filed. And all that you look at on these. The reason we don't have the trouble that perhaps somebody's having down there in Tampa where they get in the front page is that we've got a pretty good procedure here that any petitions that are received – or at least in my office, I don't know about some of the rest of them – but they are all referred straight upstairs to the State Attorney's Office, if it hasn't already gone up there before, before I look at a petition and I look to see if the State Attorney has also reviewed it and whether or not the State Attorney has signed off, or has entered any type of response to

it stating that there's no objection to the entry of the order without a hearing.

And that is solely for the purpose of – if you get the petition and you've got the statute and if you find the petition, if it meets the statutory requirements and if there's an affidavit that is required under the statute attesting to the lack of prior adjudication, or conviction and that sort of thing, then facially that petition is – the right is accorded under the statute and it should be entered. But there may be – just for that reason, there may be other records that you don't know about, or there may have been prior orders.

I think that's one place that those people down there they signed them carte blanche and nobody ever bothered to check or ask the State Attorney or anybody else to go check a record and see. Lord knows the judge can't run around and have access to checking all those records to make sure. But you don't have in this case, or in any cases that I know of, a situation usually – there may be a slip up every now and then, but usually it has been checked out and there have been no prior sealings, there have been no prior – there have been no prohibited adjudications and therefore if that is the case and it has been reviewed by the State Attorney, then I routinely will enter them if the State Attorney has also reviewed it.

And that's exactly – looking at this file, I can tell you, without violating any contents of it, that's exactly what happened in this case. And there was a response filed by the State Attorney's Office and the order was entered, there appearing that there was the appropriate affidavit

and that there had not been an adjudication or any prior adjudication. All right. Go ahead.

MR. JUDKINS: That's exactly right, Your Honor. And the plea here was to a misdemeanor, by the way. I don't know if that was made clear. And it was a no contest plea with a specific –

THE COURT: It's attempted official misconduct, that's a first degree misdemeanor.

MR. JUDKINS: That's correct. Now the other matter that these lawyers over here have mentioned is that [sic] the public importance and how you were snookered in entering this order. Number one, when the probationary order was entered, it was made clear that the terms of probation would not – would be such that it would not interfere with her Coast Guard duties. That was specifically brought to the attention of Judge Steinmeyer and he specifically addressed her Coast Guard position at the time the plea was entered.

The second thing is her position with the State Department of Revenue obviously was known to the court, and the court was well advised of all factors. Everybody that was supposed to get notice of this motion got notice of it, appropriate copies were distributed, your order was entered, and the time has expired by a long shot for anybody to take an appeal from that order.

Now, in order to try to – they don't allege any defect in the proceedings, Judge, they just personally attack the people that were involved in the proceedings. They don't say that there was – that the provisions of the statute weren't complied with, that she wasn't otherwise entitled

to an order sealing the records and that you were well within your discretion in doing that or that you abused your discretion by doing that, they use terms like "devious means" and "snookered" to try to now obviate an order that Ms. Tucker got that she was entitled to.

THE COURT: Well, at the risk of cutting off your usual brilliant eloquence, let me tell you, it looks like to me that I've looked in there and that's exactly what was on the clerk's minutes that Judge Steinmeyer had ordered all the conditions of that probation and everything else to be modified to permit her to – it said to perform all Coast Guard duties. So it did come up.

And if you go ahead and you get this petition that does that to protect whatever may – you know, as far as the military is concerned – I mean there's nothing wrong with that, and there's nothing wrong with seeking and getting a petition and getting an order to do that to deal with the situation.

If it was a misdemeanor plea, then having it where in effect somebody – maybe if it's not a fresh start at least they continue with a good record as far as the military or something of that nature. So that being the case, and there not being anything inherently wrong with the obtaining of a petition that otherwise meets all the requirements, the statutory requirements and has been reviewed by the State Attorney, then there is nothing wrong with the sealing on that basis.

But what I'm hearing over here is that perhaps inadvertently or otherwise – I mean there could be – if somebody wants to attribute some other motive besides trying to do what was intended as far as the original criminal

proceedings were concerned and then follow that up with future career purposes. Nevertheless, if there are documents that are necessary for the prosecution of a pending civil case – and apparently I get from the memorandum it must be before Judge Davey, is that right?

MR. JOHNSON: Yes, sir.

THE COURT: Then it seems to me that you have the unintended result for one purpose of then in effect putting those records beyond the reach of the parties, and that being even then contrary to what the agreement was between the parties to the civil action, which you would not have known anything about that. So you've got something happening on one track, one course, that has a result on something that is going on on another track.

Now is there any way to accommodate all of those competing interests? And that's what it seems to me that perhaps there might be if there was some limited review or modification of that order to permit that which they need for documentation purposes and that sort of stuff as far as their civil litigation, let it – it could be utilized solely for that purpose.

Also, there could be restrictions to maintain the integrity of the purpose of the statute itself in the original sealing to prohibit and enjoin the lawyers that are involved, as well as any clients or anybody else, from disseminating that information in any manner to any, for example, military official or things like that.

In other words, have it used solely – apparently their problem is they don't have some documentary evidence

but then that could be structured on a basis to assure the integrity of the sealing and to protect your client's interest as you represented your client in the criminal proceedings to attempt to avoid any undesireable [sic] results which you sought to obtain by the filing in the first place. Now I just throw that out.

MR. JUDKINS: Let me throw out one other thing, Judge. And that is, to my knowledge, Ms. Tucker has already used the benefit of this record sealing. When your records are sealed, you have an adjudication withheld on a misdemeanor, you get your records sealed, that allows you to answer certain questions in a certain way following the sealing of the records with regard to your employment, your career and that kind of thing.

She has already acted in reliance on the sealing of the order, sealing of the records in this case. And for sure, I would hate to see anything happen to make that reliance of her to be misplaced since she did so on the basis of your order and my advi[c]e. That would open a whole different can of worms.

THE COURT: It's the case where if you're entitled to the benefits of the statute on the one hand, and you go and you act accordingly, then you're right. That's what I'm looking at. That needs to be preserved. That seems to me, I don't know maybe that's something – I'm just throwing that out to each of you here to see if something that's workable couldn't be worked out.

Now I don't know for example how – I know you just don't walk out and say, "Hey, FDLE, I know you got some records out here. How about letting me have a few of them? I'm going to send my truck out there and just load

it up and I'll give them back to you." You've got a stringent procedure you go through, I assume, to get that. I'm not sure. I frankly don't know. I don't know whether they loan them out. Maybe we need to talk to the Attorney General about that. Mr. Friedlander, have you run that trail before?

MR. FRIEDLANDER: Judge, we don't know right now where the records are. And what concerns me is that they were all accumulated and presented to Your Honor, or Judge Steinmeyer, and then the sealing order came.

THE COURT: What was presented?

MR. JUDKINS: None of the stuff that they talk about, which they don't mention in their motion –

THE COURT: There's nothing in the court file concerning documents or anything else like that. What you have is the standard stuff you have in a criminal case in this file. You've got records of the docket entries of the clerk, just the minutes of what was transpiring at the various hearings. You, of course, have your information. You had the request and demand for discovery. And that's very little that you could tell anything about. There are no documents in there and there are no exhibits and this whole case was resolved on a negotiated – on a plea bargain, from looking at this file, and it was changed from an official misconduct third degree felony charge to a first degree misdemeanor of what?

MR. JUDKINS: Of attempted.

THE COURT: Of attempted. And so that's all that's in this file. Now what the State Attorney relied on,

you know, in looking at it, and would have had access, then those records, or wherever those records are – and I know under one of these orders that it does seal their records, but they maintain their records. So if they are the – if the results were there – see, they're either at FDLE or they may be in the hands of one of the law enforcement agencies, either in some vault that they have, I don't know, or they may be in the State Attorney's evidence vault. I don't know. Maybe we could ask Mr. Wade?

MR. FRIEDLANDER: I don't know either, Judge. I do know this, the documents themselves obviously would not be in your court file.

THE COURT: Right.

MR. FRIEDLANDER: And that gives me comfort. But your order says that you're sealing the court file and the FDLE investigative file.

THE COURT: That order – yes, that order would do not only what's in the court files but it also does all the other records.

MR. FRIEDLANDER: And that's our concern.

THE COURT: I understand that. But what we're trying to find out, your concern are [sic] where are some of these documents, I assume some of these other matters of physical evidence that may have some relevance or some probative value for you, for whatever use it is in proving a case, whatever the nature of your theory of your civil case is.

Now if those were made available, it seems to me I could fashion something here that would make those available subject to the order of Judge Davey as far as

what's happening in that particular case, who's doing what, or who's holding what, or who's handling what. But what I would have to do here is make sure that whatever – if I modified this order to that extent to permit the production or the utilization of that, that it could not been used for any other purpose.

* * *

MR. JUDKINS: Can I make a suggestion?

THE COURT: Yes, sir.

MR. JUDKINS: I don't want there to be any ambiguity in the fact that this order sealing the records is a bell that's going to be unrung. In other words, what I would like for you to do is to deny the motion to unseal the record. But that would be without prejudice to the plaintiff in this case to file a motion for the issuance of a subpoena duces tecum for specific items that may be in the court file that wouldn't [a]ffect – that I can look at and say, "Well this wouldn't [a]ffect the order sealing the records," because specific items of evidentiary matters that they want, such as a typewriter ribbon or something like that, that wouldn't have any effect on the order sealing the records. Then we could argue whether or not – or maybe agree whether or not the items that they sought to subpoena could be the product of an order from you authorizing them to be made available to the plaintiff for inspection or whatever purpose they want to use them.

* * *

THE COURT: Well, why couldn't I do something, Mr. Judkins, in effect, I can just – I can deny their motion in part and grant it in part and then just say that

the order would be modified to the limited extent that and then ya'll work out the details of the language to specify and set up the procedure on how it should be done and then provide that, you know, following the utilization of those documents and then they would be returned to the custody of the FDLE, and then following that return, then they would again become confidential records. Or I'll enter another order at that time upon notification to notify them that the – you know, that's there is no exception, no limited exception to the original order.

MR. JUDKINS: My first –

THE COURT: And that would also have to have in the order, I want these provisions – these protections to put somebody under – I want to put Mr. Friedlander, Mr. Johnson, they would, of course, be under the terms that that would be no unauthorized disclosure except for the limited extent of, you know, the purpose of their use in the trial. And, you know, all aspects related to that trial, but for no other purpose.

I wouldn't expect them to go off and write the Commander or the President or something complaining. I guess they could already do it if they wanted to. But, you know, the danger is some client or somebody else trying to make some use of this that would not be appropriate use. And I don't know how you would protect that.

MR. WADE: Judge, at some point in the proceedings, whether now or later, and at the risk of protracting a little bit maybe with the knowledge that our

position is going to irritate both civil sides and the criminal defense attorney here, I do want to put the State's position on the record with regard to the motion.

* * *

MR. WADE: We did not object to the sealing as the Court well knows. Now I have not had the opportunity to go back into my sealed file. I have not unsealed it. I have not had an opportunity to refresh my recollection. I do not believe that we have any original documentary evidence in that file. It's not my practice to receive it. Typically the investigating officers would retain that either in the evidence vault or in what's known as the 1-A file pertaining to this particular case. Those are the two locations where you ought to look for your documentary evidence.

THE COURT: Where is the 1-A file?

MR. WADE: It's kept – maintained with the other reports and documents by FDLE.

THE COURT: Oh, okay.

MR. WADE: In other words, they have a separate evidence room for one purpose.

THE COURT: Right.

MR. WADE: They also have what they call 1-A files which are tape recordings, may contain photographs, certified copies, physical documents. In other words, there may be things in the 1-A files that they need, there may be things in their evidence vault that are relevant.

THE COURT: Right.

MR. WADE: In my experience, however, once a sealing order is entered on the case, they will not honor a subpoena unless they have a clear authorization from the court to disregard the court's prior sealing order.

THE COURT: Right.

MR. WADE: Now having said that we didn't object to begin with where we think the exhibits are or may be, we also do not object to unsealing the records now. I don't say that because I think we were in any way misled by Mr. Judkins. I think Mr. Judkins did what, in his mind he intended to to from the outset. If he obtained a withhold of adjudication, he intended to go and ultimately try to seal the criminal records.

We did not regard Mr. Resha, the civil client, as the victim in the case. And the reason for that was that any harm visited upon Mr. Resha occcured [sic] through actions of Ms. Tucker prior to the point where these records were falsified. In other words, we viewed the State of Florida as the victim, not Mr. Resha in particular.

But nonetheless, we do not challenge his standing to appear before the court to seek the unsealing of these records either as a member of the public in general or as a member of the public who is particularly affected. I think it's clear to the court at this point that the documents are relevant to the presently pending civil suit and that to fail to make those documents and that evidence available might well work a fraud on the court. I do have one concern that nobody has addressed as yet and I throw it out because Mr. Judkins raised it in an obli[q]ue fashion. And that is, that she has already acted in reliance on this sealing order.

I took him to mean that she has at some point acted in reliance on 943.08 in either failing to acknowledge or otherwise framing an answer relying on 943.08, which in part – I don't have the statute in front of me – authorizes a person who obtains a sealing to fail to acknowledge the events covered by the records.

THE COURT: That's correct.

MR. WADE: Now depending on one's interpretation of events covered by the records, that could either be the existence of the prosecution and the result in criminal court, or it could be the underlying actions. And I throw that out because I'm seeing a freight train coming. I'm seeing a problem. And I don't know if it can be resolved through access to FDLE's evidentiary materials where we've also got what's clearly going to be a dispute in issue between the parties of what she did.

In other words, if they intend to rely on the sealing order at trial, and clearly she's entitled to not be penalized for the prior reliance at the time of the depositions. But the State has no interest in being a party to in effect fraud on either the civil or the criminal court. And that's the reason why we do not object to the unsealing of the records. Although clearly it has to be understood that any previous reliance by Ms. Tucker on 943.08 cannot be held to her detriment.

I don't think it would be permissible either through a separate complaint criminally for any perjury, or anything of that nature, and is probably not appropriate for impeachment for prior inconsistent statement. But that's outside of the scope of what we need to deal with right

now. I would anticipate the impeachment for prior and inconsistent would be an issue before the civil court.

But at the risk of saying something to irritate everybody, we do not object to the unsealing of the record, per se.

THE COURT: All right, sir. Now let's see, Mr. Duffy, I kind of truncated you several times there. Did you get to finish telling me everything you needed to tell me?

MR. DUFFY: Your Honor, I think I told you ninety-eight percent of it in the memo. And in the memo, I've outlined those cases that say that contrary to the position of opposing counsel that the discovery, or the records from the criminal file, are simply not – or should not be unsealed and that discovery should proceed through other means. Those are on, I believe page eight of that memorandum. Excuse me, page nine, the Griss (phonetic) and Suss[ex] Mutual (phonetic) case.

So those records could be sealed and stay sealed. If the court decides to fashion some relief for Mr. Resha, I would suggest that – without waiving all of the defenses to this motion that we have raised, I would suggest that the court have a determination as to the specifics of what he requests and that that be set forth in an order and that that order – as Mr. Wade points out, they may not respond to a subpoena, but if the order can direct FDLE to bring those records to trial, then they can produce the records.

* * *

MR. JOHNSON: Your Honor, can I just have a couple of things on the record before I leave, in case I get blamed for this at some point in the future?

THE COURT: Absolutely.

MR. JOHNSON: I would first –

THE COURT: Renew your objection to my ruling.

MR. JOHNSON: Renew the objection to the ruling on the ground that that was not your call to make, that was Judge Davey's call to make as to what evidence he wants to let into his courtroom.

THE COURT: Oh, wait a minute. Now I'm not saying a thing about – oh, you're talking about on the –

MR. JOHNSON: The sealing of the court file.

THE COURT: Oh, yeah. Okay.

MR. JOHNSON: I do object that that was not your call to make, that was his. The other is that I want to put on the record that under Bar[r]on vs. Florida Freedom Newspapers and under Russell vs. Miami Herald, there are no circumstances whatever under which a criminal file may ever be sealed if it involves a position of public trust and misconduct in the course of it, and this one does. There are some criminal files that may be sealed and they may be sealed for limited purposes or sealed for all purposes. But in a case where you have misconduct in office, a position of public trust, there is no basis in Florida law for sealing that and it violates the Federal Constitution and the Florida Constitution and that's the case law.

THE COURT: All right. I will respectfully then deny that and will also remind you that that was alleged as far as the case -- as far as everything we have here, there was no conviction. All of that is still an alleged matter that took place. And I assume that's the subject matter of your civil litigation.

MR. JOHNSON: Thank you, sir.

THE COURT: Good luck to you, sir.

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
)
COUNTY OF LEON)

I, JUDY W. HUSSEY, C.S.R., Official Court Reporter, Notary Public, State of Florida at Large;

DO HEREBY CERTIFY that I reported the foregoing proceedings at the time and place and in the cause indicated in the caption; that I later reduced the same to typewriting, and that the foregoing pages 1 through 48, inclusive, constitute a true and correct transcription of my shorthand notes of such proceedings had before me.

WITNESS MY HAND AND SEAL this 19th day of February, 1992, at the City of Tallahassee, County of Leon, State of Florida.

/s/ Judy W. Hussey (SEAL)
JUDY W. HUSSEY, C.S.R.
Official Court Reporter
Leon County Courthouse
Room 341
Tallahassee, Florida 32301

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO. 90-674-CFA

Plaintiff,

vs.

KATIE D. TUCKER,

Defendant.

_____/

DEFENDANT'S RESPONSE TO MOTION OF NON-PARTY TO VACATE ORDER SEALING RECORDS

On October 3, 1991, this court entered an order entitled "Order to Seal Records Pursuant to Florida Statute 943.08 and Florida Rule of Criminal Procedure 3.692." On January 6, 1992, a stranger to this action, one Donald Resha, served a document entitled "Motion to Vacate Order Sealing Records", in which Mr. Resha requests this Court to withdraw its order of October 3, 1991, and unseal defendant's records. Defendant opposes the motion of Mr. Resha and submits this memorandum to state the reasons for her opposition.

MEMORANDUM

Jurisdiction.

This Court, respectfully, no longer has personal jurisdiction over the defendant; the case is concluded and the time for the filing of an appeal has long since expired. In *Russell v. Miami Herald Pub. Co.*, 570 So. 2d 979 (Fla. 2d

DCA 1990), the former criminal defendant did not challenge the court's personal jurisdiction, but the concurring opinion noted that while the court may always retain subject matter jurisdiction over its sealed records, "the same is not true for personal jurisdiction over the recipients of expunction orders." 570 So. 2d at 984. The concurring opinion suggested that the proper procedure might be for the person seeking to vacate the order sealing records to bring an action for declaratory relief against the former criminal defendant and the State. It is inappropriate for the movant to seek to have this Court affect the rights of the defendant when the defendant is no longer subject to the jurisdiction of the Court. All other arguments responding to the motion to unseal records are made expressly subject to and without waiving the lack of personal jurisdiction over defendant.

Standing.

Mr. Resha lacks standing to file a motion in this proceeding, even if the Court has personal jurisdiction over defendant. Resha claims that he is a "victim" of a crime and, by virtue of Article I, section 16(b), Florida Constitution, he can appear in this proceeding as any proper party and argue motions before the Court. The constitutional provision does not grant standing to Resha and he does not possess standing for any other reason.

First, Resha alleges that defendant pled nolo contendere, was sentenced to probation, was required to pay costs and that adjudication was withheld, following which the records of the alleged crime were sealed. The constitutional provision requires that the person be a

victim of a "crime", but no crime was established, nor could a crime be established since the case concluded without such a determination. Absent proof of a crime, which this Court cannot now retroactively determine, Resha cannot claim to be a victim of a crime as a matter of law.

* * *

Access to courts.

* * *

Ensuring that the courts are open for "redress of any injury" does not mean that all of the records of the courts are open for inspection to any citizen of Florida, for if it did, then the facial constitutionality of section 943.058 is gravely suspect in the first instance (along with countless other statutes and policies which close court proceedings and seal court records, some of which are enumerated in *Barron v. Florida Freedom Newspapers,* 531 So. 2d 113, 118 (Fla. 1988)).

Resha turns to a federal civil rights case to buttress his access to courts argument, but the case is inapposite. *Ryland v. Shapiro,* 708 F. 2d 967 (5th Cir. 1983), did not state that a person has a right to examine all records of state courts, but held only that the plaintiffs could state a claim for money damages against state officials who had concealed from them for eleven months the fact that their daughter had been murdered by a state official. Unlike *Ryland,* this is not an action for damages; it is an effort to unseal records.

Public Interest.

Resha contends that the public interest would best be served by unsealing that which has been sealed without objection by the State of Florida because "enquiring minds wish to know." *Russell,* 570 So. 2d at 984. The reason Mr. Resha knows so much about these proceedings before entry of the order sealing the records is because, unlike the situation in *Barron v. Florida Freedom Newspapers,* 531 So. 2d 113 (Fla. 1988), the proceedings here were open to the public, the press, and Mr. Resha. There was no closure order and everyone had an opportunity to see the criminal justice system dispose of another case. Long after the cameras ceased flashing and the defendant had left her position of public office with the State of Florida, this Court rightly sealed her criminal records. Dempsey Barron, however, was able to keep the press from observing his dissolution of marriage proceedings, until the Florida Supreme Court fashioned a test and concluded that Barron's interests were outweighed by those of the public. By its own terms, that test does not even reach the issues raised here because "the presumption of openness continues through the appellate review process." 531 So. 2d at 118. Resha is entitled to no presumption of openness at this stage.

Discretion.

This Court exercised its discretion wisely in ordering Ms. Tucker's records sealed: she did not plead guilty, she pled no contest; she was not adjudicated guilty of any crime; she had an outstanding public and private record before and since charges were lodged against her. Merging bootstrapping with the intriguing "heads I win, tails

you lose" argument, Resha says that the Court, if considering whether to seal the records today, should deny the request because Ms. Tucker says that she did not falsify official documents.

* * *

Conclusion.

The motion should be denied because the Court no longer has personal jurisdiction over the former defendant and should not enter an order adversely affecting her rights in the absence of jurisdiction. The motion should be denied because Mr. Resha lacks standing to be heard. The motion should be denied on its merits.

As Judge Altenbernd observed in *Russell v. Miami Herald Pub. Co.*, 570 So. 2d 979, 984 (Fla. 2d DCA 1990), "the courts should be very circumspect at hearings designed to eliminate rights that were earlier extended by the courts."

Respectfully submitted,

McCONNAUGHHAY, ROLAND,
MAIDA, CHERR &
McCRANIE, P.A.

/s/ B. S. Duffy
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FAX (904) 222-4359
Attorneys for defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 20th day of Janury, 1992, to:

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/s/ B. S. Duffy
BRIAN S. DUFFY

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA

v.

CASE NO. 90-674-CFA

KATIE D. TUCKER,

Defendant.

_____/

MOTION TO VACATE ORDER SEALING RECORDS

Victim, Donald Resha, by and through his undersigned counsel, and pursuant to Article I, §§ 16 (b) and 21, *Constitution of Florida;* Amendment XIV, *Constitution of the United States;* and 42 U.S.C. § 1983, moves that this honorable Court vacate its order of October 3, 1991, sealing the criminal record of Defendant Katie Tucker and states:

1. In the above-styled matter, Defendant Katie Tucker pled nolo contendere to a charge of official misconduct involving falsification of official documents. She was sentenced to serve a term of probation and to pay costs, adjudication being withheld.

2. Victim Donald Resha has two civil cases pending before this Court in which the instant case figures prominently. In case 90-454, Katie Tucker is the Defendant. In case 91-4156, she is a key adverse witness for both parties in a negligence action by Resha against the State of Florida.

3. On October 3, 1991, this Court sealed the file of the instant case.

4. Donald Resha is the victim of the crime for which Katie Tucker was sentenced in the instant case.

5. Donald Resha was denied his rights under Article I, § 16 (b) of the Florida Constitution to be informed of the motion to seal records, to be present, and to be heard on the matter.

6. The sealing of the records of this case prior to the trial of Resha's two civil cases deprives him of important evidence that might otherwise be admissible and therefore violates his right of access to courts as guaranteed by Article I, § 21 of the Florida Constitution.

7. For the reason stated in Paragraph 6, such sealing deprives Resha of his right of access to courts as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

8. Defendant Tucker might not be eligible to avail herself of the provisions of the statute and court rule governing sealing of criminal files.

9. Whether or not Defendant is technically eligible to have her criminal record sealed, circumstances which were not known to the Court at the time of its order would call for a different result had they been known.

10. The sealing of Defendant's records is contrary to public policy and the constitutional right of the public to access to official information.

WHEREFORE Victim Donald Resha moves that the Court vacate its order sealing Defendant's criminal file.

MEMORANDUM OF LAW

I. PERTINENT FACTS

The Governor and Cabinet suspended Defendant Katie Tucker from her position as Executive Director of the Florida Department of Revenue after an investigation by FDLE concluded that she had abused her authority by using the machinery of government to attack Resha for being a political opponent of herself and her husband. Tucker caused her employees to investigate Resha and audit his businesses and planted rumors in the Department that Resha was involved with illegal sales of drugs, guns, and pornography as well as money laundering, tax evasion, and organized crime. Investigations by the Department of Revenue and FDLE discredited these allegations, but Resha was severely damaged by them.

Defendant Tucker claimed that she had never ordered investigations or audits of Resha or his businesses and had not made the allegations. She said she had merely ordered a general review of bookstores and video shops and that others in her department had singled out Resha, investigated him, audited his businesses, and spread the defamatory allegations about him, all without her knowledge. The Governor and Cabinet allowed her time during her suspension to produce evidence corroborating her version of events. FDLE produced extensive evidence that, during this period, Tucker fabricated, altered, and backdated documents to support her story. FDLE arrested her for fabricating one of the documents, thereby giving rise to the instant case in which Tucker pled nolo contendere and was sentenced to a term of probation and payment of costs.

Discovery in Resha's civil suit against Tucker was held in abeyance pending resolution of the instant criminal case. Following other delays, Resha's attorneys deposed Tucker on September 4-5, 1991. At that deposition, Tucker refused to answer certain questions about the instant case. She was informed at that time that a motion to compel her to answer would be forthcoming. Resha moved to compel answers and, at a hearing on the morning of December 31, 1991, Judge Kevin Davey of this Court ordered her to answer. That afternoon, her civil attorney, Brian Duffy, learned for the first time that she had got her criminal attorney, Jimmy Judkins, to obtain the sealing of the instant case file. Mr. Duffy related these events to Judge Davey in a letter of December 31, 1991, and submitted a supplemental memorandum arguing that Judge Sauls' sealing of this record protected Tucker from obeying Judge Davey's order of that morning. In a letter of January 2, 1992, Judge Davey stood by his order, though he noted that the material discovered may be ultimately deemed inadmissible.

* * *

DISCRETION OF THE COURT.

Chapter 88-247, *Laws of Florida*, amended § 943.058, *Florida Statutes*, to sweep away case law which held sealing and expunction to be a matter of right for those who met the statutory criteria. Under the 1988 amendment, the decision to seal a file lies in the sole discretion of the court. Thus even if the Defendant is eligible for sealing, she is not automatically entitled to it. The court should

take into account the underlying policies behind the statute to assess whether an individual petition furthers those policies.

A person whose guilt under the original charge is now in doubt would be an obvious intended beneficiary of the sealing statute. So too would an impressionable youth led astray by overbearing companions. A 48-year-old lifelong political operative with a Ph.D. and a history of official misconduct would hardly seem to qualify.

The rehabilitative policy of the statute would seem to call for convincing evidence of contrition on the part of the Defendant. Yet this Defendant remains defiant and unrepentant. Despite the overwhelming quantum of evidence developed by FDLE, the Defendant persists in self-contradictory denials that she has done anything wrong and blames her fall on a conspiracy so vast and fantastic as to tax the credulity of even the most gullible. Further, she persists in making these palpably false assertions under oath as in her deposition of September 4-5, 1991. Even the instant sealing order was obtained through the same sort of deceitful chicanery that got this Defendant in trouble in the first place. By keeping her civil attorney unaware of the sealing of her criminal file and keeping this Court unaware of the sealing order's impact on two pending civil cases, she demonstrated her continued willingness to manipulate others to their detriment. Such Machiavellian disregard even for those who are acting for her benefit demonstrates a singular lack of rehabilitation or conscience.

Sealing this Defendant's record is of no legitimate practical benefit to her. As Executive Director of the

Department of Revenue, she occupied perhaps the highest non-elected post in the executive branch of Florida government and was in charge of substantially all of the State's income. From those to whom much is given, much is expected. Accordingly, her arrest and sentencing, and the preceding events, were the subject of spectacular media coverage. It is inconceivable that she could conceal these events from a prospective employer or any other responsible person with a motivation to learn about them. What she stands to gain is the ignorance of a civil jury. This hardly seems a legitimate benefit. It leaves her victim worse off than if she had never been arrested.

V. PUBLIC'S RIGHT TO KNOW.

The 1988 amendment to § 943.058, *Florida Statutes*, creates judicial discretion in sealing a criminal file. However, that discretion is not exercised in a vacuum. It is subject to strictures, designed to protect the public's right of access to public records, which are constitutional in nature.

The controlling authority is *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988). There the Florida Supreme Court unsealed the divorce records of a former Florida Senate president and set forth the law of access to judicial records.

> At the outset, we hold that both civil and *criminal* court proceedings in Florida are public events and adhere to the well established common law right of access to court proceedings and *records*.

Id. at 116 (emphasis added).

Citing numerous federal and state cases, the Florida Supreme Court grounded this right in the First and Fourteenth Amendments to the U.S. Constitution, thus overriding any statutes to the contrary. *Id.* Statutes furthering compelling state interests may afford certain exceptions such as adoptions and juvenile proceedings. *Id.* at 119. In some circumstances, a countervailing privacy right may allow closure,

> However, a privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individual seeking closure.

Id. at 118.

Plainly, Executive Director of the Florida Department of Revenue is a position of public trust and the falsification of that department's official records for the purpose of personal benefit to the offender and injury to an innocent political opponent are matters of most grave continuing concern to the public and even to future generations.

Standing to challenge such a closure of court records is available to any member of the public or the media. *Id.* Moreover,

> [T]he party seeking closure continues to have the burden to justify closure. This heavy burden is placed on the party seeking closure not only because of the strong presumption of openness but also because those challenging the order will generally have little or no knowledge of the specific grounds requiring closure.

Id. at 118-9.

Katie Tucker's tenure at the Department of Revenue embodied a number of seminal events in the history of Florida government. These events are of interest not only to historians and political scientists, but to those who seek to establish mechanisms to prevent such abuses in the future. A sealing of criminal records may pass constitutional muster in many cases, but not when the statute is applied to events of great public importance involving misconduct by a high official. This is especially so when the sealing is of no legitimate benefit to the offender and is of significant detriment to the victim and to the public at large.

Respectfully submitted,

/s/ Richard E. Johnson
Richard E. Johnson
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Attorneys for Victim

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by U.S. Mail this 6 day of January, 1992 to James P. Judkins, Judkins & Simpson, P.O. Box 10368,

Tallahassee, Florida 32302-2638; Neill G. Wade, State Attorney's Office, Leon County Courthouse, Tallahassee, Florida 32301; Florida Department of Law Enforcement, P.O. Box 1489, Tallahassee, Florida 32302; Brian Duffy, P.O. Drawer 229, Tallahassee, Florida 32302-0229. Courtesy copies to the Honorable N. Sanders Sauls and the Honorable P. Kevin Davey, Leon County Courthouse, Tallahassee, Florida 32301.

/s/ Richard E. Johnson
Richard E. Johnson

(seal)

Circuit Court
Second Judicial Circuit of Florida

P. KEVIN DAVEY
CIRCUIT JUDGE

LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301
(904) 488-6527

January 2, 1992

Brian S. Duffy, Esq.
Post Office Drawer 229
Tallahassee, Florida 32302

RE: Resha v. Tucker,
Leon County Case No. 90-454

Dear Mr. Duffy:

Your letter of December 31, 1991 has been received. The fact that Ms. Tucker's criminal record has been sealed pursuant to Florida Statute § 943.08 does not, in my view, alter the rulings made at our December 31, 1991 hearing. The discovery inquiries made by the Plaintiff concerning the entry of her plea did not violate the spirit or the letter of Section 943.08.

While the testimony or information being [e]llicited may ultimately be deemed inadmissible at trial, this discovery appears to be reasonably calculated to lead to possible, admissible evidence.

By copy of this letter to counsel for the Plaintiff, I am advising them that it is unnecessary for them to file a memorandum responsive to yours.

Sincerely yours,

/s/ P. Kevin Davey
P. Kevin Davey

PKD/dh

cc: Richard Johnson, Esq.
William A. Friedlander, Esq.

LAW OFFICES

McCONNAUGHHAY, ROLAND, MAIDA,
CHERR & McCRANIE, P.A.

* * *

PLEASE REPLY TO:
Tallahassee

December 31, 1991

The Honorable P. Kevin Davey
Circuit Judge
Leon County Courthouse
Tallahassee, FL 32301

RE: Resha v. Tucker
Case No. 90-454

Dear Judge Davey:

This follows our hearing on discovery motions held this morning.

On the record at the hearing, you had indicated that plaintiff could propound interrogatories to defendant touching upon issues which had been the subject of defendant's deposition of September 4-5, 1991. I agreed to prepare a proposed order based upon your oral rulings

and circulate it to plaintiff's counsel before submitting it to you; I am in the process of doing so. However, this afternoon, I learned for the very first time that the criminal charges against Mrs. Tucker have been sealed by order of this court. I believe this changes the situation dramatically. While questions about the criminal charges may have been appropriate at the time of the deposition for discovery purposes (a point we do not concede), questions about the criminal charges after the criminal case has been sealed would not appear to be appropriate by my reading of the statute.

Rather than counsel engaging in a battle over the form of the order and possibly the filing of petitions to protect positions, I suggest that a final decision on the discovery regarding the criminal charges be held in abeyance until plaintiff's counsel have an opportunity to submit a memorandum or present oral argument.

Kindly advise as to the manner in which you wish to proceed. Thank you very much.

Yours sincerely,
/s/ Brian S. Duffy
Brian S. Duffy

BSD/mcb

Enclosure (copy of Supplemental Memorandum)

cc: Mr. Friedlander
Mr. Johnson

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

DONALD RESHA,

Plaintiff,

CASE NO.: 90-454

vs.

KATIE TUCKER,

Defendant.

_____/

SUPPLEMENT TO DEFENDANT'S MEMORANDUM RESPONDING TO MOTION REQUESTING ORDER APPOINTING SPECIAL MASTER, COMPELLING DISCOVERY, AND FOR SANCTIONS

Defendant supplements Defendant's Memorandum Responding to Motion Requesting Order Appointing Special Master, Compelling Discovery, and for Sanctions served December 27, 1991, as follows:

After the hearing on December 31, 1991, counsel for defendant learned for the first time that an order had been entered by this Court sealing records of the criminal case referred to on pages 269-270 of the deposition of the defendant taken on September 5, 1991 (defendant was represented by other counsel in that case). That order, dated October 3, 1991, was entered after the deposition of the defendant. A copy of that three-page order is attached as Exhibit A; defendant requests that the Court take judicial notice of the order.

In light of the requirements of that order, the dictates of section 943.08, Florida Statutes, and the inadmissibility of any evidence regarding the criminal charges under

Florida law, including but not limited to section 90.410, Florida Statutes, defendant submits that further questioning regarding the criminal charges should not be permitted.

Respectfully submitted,

McCONNAUGHHAY,
ROLAND, MAIDA, CHERR,
& McCRANIE, P.A.

/s/ Brian S. Duffy
BRIAN S. DUFFY
Florida Bar Number: 180007
Post Office Drawer 229
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(904) 222-8121
Fax Number: (904) 222-4359
Attorneys for defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 31st day of December 1991, to:

RICHARD JOHNSON
Spriggs & Johnson
324 W. College Ave
Tallahassee, FL 32301

WILLIAM A. FRIEDLANDER
Attorney at Law -
Lake Jackson Office Park
3045 Tower Court
Tallahassee, FL 32303

/s/ Brian S. Duffy
BRIAN S. DUFFY

Attachment (Order)

DEFENDANTS EXHIBIT A

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO.: 90-674-CFA

Plaintiff,

vs.

KATIE D. TUCKER,

Defendant.

_____/

ORDER TO SEAL RECORDS PURSUANT TO FLORIDA STATUTE 943.08 AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.692

THIS CAUSE having come on to be heard before me upon the Defendant's Petition To Seal records concerning her arrest on or about the 7th day of February, 1990, by the Florida Department of Law Enforcement, and the court having been advised in the premises, hereby finds:

1. That the Defendant has never been previously adjudicated guilty of a criminal offense or comparable ordinance violation.

2. That the Defendant was not adjudicated guilty of charges stemming from the arrest or criminal activity to which the instant petition pertains.

3. That the Defendant has not secured a prior records expunction or sealing; whereupon, it is hereby

ORDERED AND ADJUDGED that the petition to seal records be and the same is hereby GRANTED. All court

records pertaining to the above-styled case shall be sealed in accordance with the procedures set forth in Florida Statute 943.058 and Florida Rule of Criminal Procedure 3.692; and it is further

ORDERED AND ADJUDGED that the Clerk of the court shall forward certified copies of this order to the State Attorney, the Florida Department of Law Enforcement, and to any other agency which the Clerk's records reflect has received instant criminal history record information from the court, who will comply with the procedure set forth in Florida Statute 943.058 and appropriate regulations of the Department of Law Enforcement and who will further forward this order to any agency that their records reflect has received the instant criminal history record information and it is further

ORDERED AND ADJUDGED that the Florida Department of Law Enforcement and all other agencies which received the instant criminal history record information shall seal all information concerning indicia of arrest or criminal history record information in reference to this Defendant in accordance with the procedures set forth in Florida Statute 943.058 and Florida Rule of Criminal Procedure 3.692.

All cost of certified copies involved herein are to be borne by the Defendant.

DONE AND ORDERED this 3rd day of October, 1991, at Tallahassee, Leon County, Florida.

/s/ N. Sanders Sauls
CIRCUIT COURT

Copies to:

James P. Judkins
Judkins & Simpson, P.A.
Post Office Box 10368
Tallahassee, Florida 32302-2368

Neill G. Wade
Assistant State Attorney
Leon County Courthouse
Tallahassee, Florida 32301

Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

PERSONAL HISTORY:

Full Name:	Katie D. Tucker
Address:	2529 Betton Woods Drive Tallahassee, Florida 32312
Date of Birth:	12/17/43
Date of Arrest:	February 7, 1990
Arresting Agency:	Florida Department of Law Enforcement
Arresting Agency Case Number	90-674-CFA
Arresting Charge:	Official Misconduct

Katie D. TUCKER, Petitioner,

v.

Donald George RESHA, Jr., Respondent.

No. 92-1744.

District Court of Appeal of Florida,
First District.

Oct. 12, 1992.

On Motion for Rehearing and Certification
Dec. 30, 1992.

Former public official petitioned for writ of common-law certiorari for review of trial court's order denying his motion for summary judgment as to two counts of § 1983 complaint. The District Court of Appeal held that order did not violate clearly established principle of law or otherwise depart from essential requirements of law resulting in miscarriage of justice.

Petition denied.

* * *

Brian S. Duffy, McConnaughhay, Roland, Maida, Cherr & McCranie, P.A., Tallahassee, for petitioner.

Richard E. Johnson, Spriggs & Johnson, and William A. Friedlander, Tallahassee, for respondent.

PER CURIAM.

Tucker, the defendant below, petitioned for a writ of common-law certiorari for review of the trial court's order denying Tucker's motion for summary judgment as to Counts IV and VII of respondent Resha's amended and supplemental complaint.

* * *

During the time period at issue, Petitioner was Executive Director of the Florida Department of Revenue ("DOR"). Tucker asserted a claim of qualified immunity, which shields from civil liability those governmental officials performing discretionary functions, to the extent "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982); *Green v. Brantley,* 941 F.2d 1146, 1148 (11th Cir.1991). Tucker contended that the *federal* presumptive right not to stand trial or to face the other burdens of litigation established in *Harlow* and *Mitchell* affords her the opportunity for immediate review of the non-final order denying summary judgment. *See Felder v. Casey,* 487 U.S. 131, 151, 108 S.Ct. 2302, 2313-14, 101 L.Ed.2d 123, 146 (1988) (state courts are required under Supremacy Clause to proceed in a manner that protects the substantial federal rights of the parties).

* * *

Counts IV and VII involved claims of deprivation of civil rights based on 42 U.S.C., section 1983. Tucker asserted the claim of qualified immunity to support the motion for summary judgment on both counts.

* * *

Count IV

Paragraphs 34 and 35 of Resha's amended complaint allege a violation of his First Amendment rights by Tucker:

> 34. The actions of KATIE TUCKER as described herein were undertaken intentionally, willfully and maliciously under color of state law, and in an effort to drive Plaintiff DONALD RESHA out of the 1989 race for president of the AFL-CIO in Florida, for retaliating against him for having been a candidate in the past, and for the further purpose of destroying his viability as a candidate to compete against TUCKER'S husband in all future elections.
>
> 35. The First Amendment to the Constitution of the United States of America provides DONALD RESHA and all others with certain inalienable rights, including without limitation, the right to associate with others by seeking a union office to represent other workers, to free speech, and to support public and union officials of his choosing.

In support of her position, Tucker stated in an affidavit that, as DOR Executive Director from June 1988 to February 1990, she "had full discretionary authority to order tax investigations and audits of persons subject to tax liability under the laws of Florida, and this authority was part of the normal duties delegated to the Executive Director pursuant to chapter 213 of the Florida Statutes." Tucker asserted that the successful result of DOR's tax audit demonstrated the legitimacy of the effort undertaken. Resha conceded the audit showed he had failed to pay about $300 of a total tax amounting to more than $30,000.

* * *

Tucker's answer to Resha's amended complaint admitted Paragraph 35. Tucker essentially admitted that

Resha's seeking a union office is a clearly established, constitutionally protected activity under *Mitchell* and *Harlow.* Our independent research has disclosed ample decisional authority to show the First Amendment guarantees of free speech and association include the protection of an individual's right to join and participate in a labor union.

* * *

The issue of alleged retaliatory state conduct against First Amendment rights was present in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, 484 (1977), which provides that the party retaliated against must show the constitutionally protected conduct was at least a "motivating factor" in the official's retaliatory response. Resha alleged Tucker knew about the prior political encounters involving her husband and Resha, undertook to protect and assist her husband as a prospective candidate, and in so doing "set out to destroy" Resha's reputation and businesses. See Amended Complaint, Paragraphs 7, 20 and 34. Having carefully reviewed Resha's amended complaint, as well as Tucker's answer, affidavit, and motion for summary judgment, and all factual inferences in the light most favorable to Respondent as the non-moving party, we find a genuine factual issue exists regarding Tucker's conduct, so as to preclude a grant of summary judgment based on qualified immunity.

Count VII

This count alleged a civil rights cover-up. The pertinent sections of the amended complaint alleged:

47. When Defendant, KATIE TUCKER, learned that her actions as described above may expose her to the loss of her job and to money damages as the result of this lawsuit, KATIE TUCKER, engaged in a cover-up in order to deprive Plaintiff of his right to access to courts and to further support and aggravate her previous slander and other tortious and unwarranted conduct against Plaintiff.

48. Particularly, on or about January 31, 1990, Defendant, KATIE TUCKER, went to her office and fraudulently prepared documents, back dating them, and then distributing them, in an effort to create an after-the-fact paper trail that would have justified her initial actions had these documents in fact existed at the time of the dates thereon.

49. The actions of TUCKER, as described in the preceding paragraphs, were done and taken under color of state law and with the intent to cover up Defendant's previous violations of Plaintiff's constitutional rights.

In Tucker's answer and deposition, the allegations in Count VII were denied.

* * *

We find a genuine issue of material fact exists concerning whether the cover-up occurred, and hold the order denying summary judgment on Count VII did not depart from the essential requirements of law.

* * *

The Petition for Writ of Common-Law Certiorari is DENIED.

BOOTH, SHIVERS and BARFIELD, JJ., concur.

ON MOTION FOR REHEARING
AND CERTIFICATION

PER CURIAM.

Petitioner Tucker's motion for rehearing is denied, but we certify the following question as one of great public importance:

> IS A PUBLIC OFFICIAL ASSERTING QUALIFIED IMMUNITY AS A DEFENSE TO A FEDERAL CIVIL RIGHTS CLAIM ENTITLED IN THE FLORIDA COURTS TO THE SAME STANDARD OF REVIEW OF DENIAL OF HER MOTION FOR SUMMARY JUDGMENT AS IS AVAILABLE IN THE FEDERAL COURTS?

BOOTH, SHIVERS and BARFIELD, JJ., concur.

---

§ 943.058, Fla. Stat. (1991):

Criminal history record expunction or sealing.–

(1) Notwithstanding statutes dealing more generally with the preservation and destruction of public records, the Department of Law Enforcement, in consultation with the Department of State, may provide, by rule adopted pursuant to chapter 120, for the administrative expunction of any nonjudicial record of arrest made contrary to law or by mistake or when the record no longer serves a useful purpose.

(2) The courts of this state shall continue to have jurisdiction over their own procedures, including the keeping, sealing, expunction, or correction of judicial records containing criminal history information. The courts may order the sealing or expunction of any other criminal history record, provided:

(a) The person who is the subject of the record has never previously been adjudicated guilty of a criminal offense or comparable ordinance violation;

(b) The person who is the subject of the record has not been adjudicated guilty of any of the charges stemming from the arrest or alleged criminal activity to which the records expunction petition pertains;

(c) The person who is the subject of the record has not secured a prior records expunction or sealing under this section, former s. 893.14, or former s. 901.33; and

(d) Such record has been sealed under this section, former s. 893.14, or former s. 901.33 for at least 10 years; except that, this condition shall not apply in any instance in which an indictment or information was not filed

against the person who is the subject of the record or in which an indictment or information was dismissed by the prosecutor or the court.

This subsection does not confer upon any person who meets the criteria set out in this subsection a right to the sealing or expunction of any criminal history record, and any request for sealing or expunction of a criminal history record may be denied at the sole discretion of the court.

(3)(a) Upon a finding that all the relevant criteria set out in paragraphs (2)(a)-(d) have been met, the records maintained by the Department of Law Enforcement may be ordered sealed or expunged by any court of competent jurisdiction; and thereafter such records and other records sealed pursuant to this section, former s. 893.14, former s. 901.33, or similar laws shall be nonpublic records available only to the subject, his attorney, criminal justice agencies for their respective criminal justice purposes, or to those entities set forth in paragraph (6)(a), paragraph (6)(d), or paragraph (6)(e) for their respective licensing and employment purposes.

(b) It is unlawful for any employee of an entity set forth in paragraph (6)(a), paragraph (6)(d), or paragraph (6)(e), or for a private contractor or any employee of such contractor, to disclose information relating to the existence of a sealed or expunged record of a person who seeks employment or licensure with such entity or contractor, except to the person to whom the record relates or to persons having direct responsibility for employment or

licensure decisions. Any person who violates this paragraph is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

An order sealing criminal history records pursuant to this subsection shall not be construed to require that the records be surrendered to the court, and such records shall continue to be maintained by the Department of Law Enforcement as well as by other involved criminal justice agencies.

(4) In judicial proceedings under subsections (2) and (3), a copy of the petition for sealing or the petition for expunction shall be served upon the prosecuting authority charged with the duty of prosecuting the offense and upon the arresting agency; however, it shall not be necessary to make any agency other than the state a party. The appropriate state attorney shall be served with the petition and shall respond after a review of the petitioner's entire multistate criminal history record. If relief is granted, the clerk of the court shall certify copies of the order to the prosecutor and to the arresting agency. The arresting agency shall be responsible for forwarding the order to any other agency to which the arresting agency itself disseminated the criminal history record information within the purview of the order. The Department of Law Enforcement shall forward the order to the Federal Bureau of Investigation. The clerk of the court shall certify a copy of the order to any other agency which the records of the clerk reflect has received the affected criminal history information from the court. A notation indicating compliance with an order to expunge may be retained for use thereafter only to confirm the expunction upon inquiry of the ordering court.

(5) Notwithstanding other laws to the contrary, a criminal justice agency may honor laws, court orders, and official requests of other jurisdictions relating to expunction, sealing, correction, or confidential handling of criminal history records or information derived therefrom.

(6) The effect of expunction or sealing of criminal history records under this section or other provisions of law, including former ss. 893.14 and 901.33, shall be that when all criminal history records have been sealed or expunged, the subject of such records may lawfully deny or fail to acknowledge the events covered by the expunged or sealed records, except in the following circumstances:

(a) When the person who is the subject of the record is a candidate for employment with a criminal justice agency;

(b) When the person who is the subject of the record is a defendant in a criminal prosecution;

(c) When the person who is the subject of the record subsequently petitions for relief under this section;

(d) When the person who is the subject of the record is a candidate for admission to The Florida Bar; or

(e) When the person who is the subject of the record is seeking to be employed or licensed by or to contract with the Department of Health and Rehabilitative Services or to be employed or used by such contractor or licensee in a sensitive position having direct contract with children or the developmentally disabled or the aged or elderly as provided in s. 39.076, s. 110.1127(3), s. 393.063(3), s. 394.455(20), s. 396.032(8), s. 397.021(8),

s. 402.302(8), s. 402.313(3), s. 409.175(2)(h), s. 415.102(4), s. 415.103, or chapter 400, or to be employed or licensed by the Office of Teacher Education, Certification, Staff Development, and Professional Practices of the Department of Education, any district school board, or any local governmental entity licensing child care facilities.

The courts or the Department of Law Enforcement may refer to and disseminate information contained in sealed records in any of these circumstances. Subject to the exceptions stated herein, no person as to whom an expunction or sealing has been accomplished shall be held thereafter under any provision of law of this state to be guilty of perjury or to be otherwise liable for giving a false statement by reason of such person's failure to recite or acknowledge expunged or sealed criminal history records.

(7) Each petition to a court for sealing or expunction of criminal history records shall be complete only when accompanied by the petitioner's sworn statement that:

(a) The petitioner has never previously been adjudicated guilty of a criminal offense or comparable ordinance violation.

(b) The petitioner has not been adjudicated guilty of any of the charges stemming from the arrest or alleged criminal activity to which the petition pertains.

(c) The petitioner has never secured a prior sealing or expunction of records under this section, former s. 893.14, or former s. 901.33, nor from any other jurisdiction outside of the state.

(d) To the best of his knowledge and belief, the petitioner is eligible for such a sealing or expunction.

Any person who knowingly provides false information on such sworn statement to the court shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(8) The Department of Law Enforcement shall notify the appropriate state attorney of any order to seal or expunge which is contrary to law because the subject of the record has previously been convicted of a crime of comparable ordinance violation or has a prior criminal history record sealed or expunged. Upon receipt of such notice, the state attorney shall take action to correct the record and petition the court to void the order. The Department of Law Enforcement shall seal the record until such time as the order is voided by the court.

(9) A criminal history record relating to a violation of chapter 794, s. 800.04, or s. 827.071 in which the victim was under the age of 18 years shall not be expunged in any instance where the defendant was found or pled guilty, without regard to whether adjudication was withheld.

RULE 3.692 PETITION TO SEAL OR EXPUNGE

(a) All relief sought by reason of Section 943.058, Florida Statutes (1981), shall be by petition in writing, filed with the clerk. Such petition shall state the grounds upon which it is based and the official records to which it

is directed and shall be supported by an affidavit of the party seeking relief which affidavit shall state with particularity the statutory grounds and the facts in support of such motion. A copy of the petition and affidavit shall be served upon the prosecuting attorney and upon the arresting authority. Notice and hearing shall be as provided in Rule 3.590(c).

(b) The State may traverse or demur to such petition and affidavit. The court may receive evidence on any issue of fact necessary to the decision of the petition.

(c) If the petition is granted the court shall enter its order in writing so stating and further setting forth the records and agencies or departments to which it is directed.

(d) Upon the receipt of such order the clerk shall furnish a certified copy thereof to each agency or department named therein excepting the court.

(e) In regard to the official records of the court including the court file of the cause, the clerk shall:

(1) Remove from the official records of the court, excepting the court file, all entries and records subject to such order; provided that if it shall not be practical to remove such entries and records then to make certified copies thereof and thereafter expunge by appropriate names[1] such original entries and records.

(2) Seal such entries and records, or certified copies thereof, together with the court file and retain the same in

---

[1] So in original court order.

a non-public index subject to further order of the court. (See: Johnson v. State, 336 So.2d 93 (Fla. 1976).)

(3) In multi-defendant cases the clerk shall make a certified copy of the contents of the court file which shall be sealed pursuant to subsection (2). Thereafter all references to the petitioner shall be expunged from the original court file.

(f) All costs of certified copies involved herein shall be borne by the movant, unless he be indigent.

Added Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247). Amended Nov. 29, 1984, effective Jan. 1, 1985 (462 So.2d 386).

Committee Note

1984 Amendment. Substantially the same as the former rule. The statutory reference in (1) was changed to cite the current statute and terminology was changed accordingly. Subsection (f) of the former rule was deleted since it dealt with substantive matters covered by Section 943.058 of the Florida Statutes (1981).

Supreme Court, U.S.
FILED
JUL 7 1993
OFFICE OF THE CLERK

(2)

No. 92-1960

In The

Supreme Court of the United States

October Term, 1993

DONALD G. RESHA, JR. and STATE OF FLORIDA,

Petitioners,

vs.

KATIE D. TUCKER,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Proceedings Below

At the trial court petitioner Resha sought the court *and* investigative agency files pertaining to respondent Tucker. Resha[1] claimed that he needed the court and agency documents as evidence in his pending civil action against Tucker. A78-79. The decision of the First District Court of Appeal assailed here found that "Resha failed to demonstrate . . . the unavailability or lack of other means of obtaining the information sought." A5.

The trial judge in the civil action had earlier expressly permitted the inquiry sought by Resha: "The discovery inquiries made by the Plaintiff [Resha] concerning the entry of her [Tucker's] plea did not violate the spirit or the letter of Section 943.08." A87.

Resha purported to have a need for the criminal *court* file of Tucker so as to be equipped to impeach Tucker in the civil case with her *nolo contendere* plea. The trial court recognized that the *nolo* plea would not be admissible in the civil case, and denied access on that basis.[2] A111. Resha's attorney agreed. A113.

---

[1] Mr. Resha did not personally attend the hearing. No evidence in any form was submitted at the hearing. The trial court heard and read only arguments of counsel.

[2] Fla. Stat. §90.410.

REASONS FOR DENYING THE WRIT

I. The Florida Court Decided The Federal Questions Correctly.

There is no qualified right of public access to judicial or executive agency records of completed criminal prosecutions which do not result in a conviction.

Resha wanted the file of the investigative agency, the Florida Department of Law Enforcement, for use as evidence in his civil action against Tucker. The First Amendment is not implicated in the denial of access to those records. *El Dia, Inc. v. Hernandez Colon,* 963 F.2d 488, 494-95 (1st Cir. 1992).

Resha relies upon cases holding that the First Amendment is implicated when courts bar access to court proceedings that had traditionally been open to the public. Resha makes no effort to establish that documents pertaining to concluded criminal court proceedings or executive agency investigations have traditionally remained open to public scrutiny. Rather, Resha confesses that "Congress and 45 State Legislatures have enacted statutes similar to Florida's, with similar objectives in mind." Petition, page 12.[3] The Florida sealing statute is nearly twenty years old.[4] Pertinent case law is older. In *United States v. Kelly,* 55 F. 2d 67, 70 (2d Cir. 1932), the court stated that "[i]t should be added that all United States attorneys and marshals . . . are required to destroy or to surrender to the defendant all such records after

---

[3] *See,* footnote 32, *Times* Petition.

[4] Fla. Stat. §901.33 (1975).

acquittal or when the prisoner is finally discharged without conviction."[5] The tradition is to protect the accused after the proceedings are concluded without a conviction.

In re Washington Post Co., 807 F. 2d 383 (4th Cir. 1986), is but one of several cases standing for the proposition that the press has a First Amendment right of access to witness criminal proceedings absent a compelling interest justifying closure. Despite Resha's argument that "[t]he Florida Court of Appeal's decision approving this sealing clearly conflicts with *In re Washington Post*",[6] there is no contention that Tucker's plea and sentencing hearing was closed. Moreover, the Florida statute itself implicitly recognizes the State Legislature's compelling interest in protecting the liberty interests (privacy, reputation, obtaining employment) of former criminal defendants.

II. The Florida Decision Does Not Directly Conflict With A Decision of the United States First Circuit Court of Appeals Invalidating A Massachusetts Statute.

The Florida decision does not conflict with *Globe Newspaper Co. v. Pokaski*, 868 F. 2d 497 (1st Cir. 1989). Unlike the challenged statute in *Pokaski*, the Florida statute provides for a judicial determination, and does not reduce the sealing procedure to a mandatory ministerial

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[5] *See.* also, *Schulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906).

[6] Petition, page 18.

exercise. A102, 107.[7] Unlike the challenged statute in *Pokaski*, the Florida statute only allows a former criminal defendant to enjoy the benefits of sealing on one occasion. A101. Unlike the challenged statute in *Pokaski*, the Florida statute is not automatic; thus in Florida there is an opportunity for interested persons monitoring the criminal litigation (including Petitioner State of Florida, a party to every criminal case) to oppose the sealing motion.[8] A103, 107.

Pokaski found that a less restrictive means of promoting the Commonwealth's objectives would be to simply allow "defendants to move for the permanent sealing of their records at the conclusion of trials and the probable cause hearings, just as defendants are allowed to move for the closure of proceedings." *Pokaski*, 868, F. 2d at 507. This is precisely the procedure ordained by the Florida Legislature and the Florida Supreme Court. A101-108.

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[7] To the extent that the Massachusetts statute was not mandatory, *Pokaski* required only that the trial court make "specific, on the record findings that sealing was necessary to effectuate a compelling governmental interest." *Pokaski*, 968 F. 2d at 511. The Florida statute itself evidences the compelling governmental interest, should such be necessary.

[8] Although none of the lawyers in the civil litigation between Resha and Tucker monitored the criminal case after sentencing, Resha never proved that public notice was not afforded. *State ex rel. Tallahassee Democrat v. Cooksey*, 371 So. 2d 207 (Fla. 1st DCA 1979) (establishing public notice requirements for closure of pending criminal proceedings).

III. The Florida Court Has Not Decided An Important Question of Federal Law Which Should Be Decided By This Court.

The questions presented here are not sufficiently important to warrant review in light of the State's amendment of the statute. Resha stated in his brief before the Florida Supreme Court that: "The latest version of Florida's sealing law, §943.059, Fla. Stat. (1992 Supp.), specifically excludes criminal records of official misconduct from eligibility for sealing, even if adjudication is withheld." Petitioner's Initial Brief, page 25. In other words, sealing of files relating to the type of criminal charges lodged against Tucker is no longer permitted.

Resha argues that "this Court should take this opportunity to decide that the protection of the First Amendment extends to court records" and asserts that "[t]here is no reasoned distinction between the values underlying access to on-going proceedings and those proceedings which have concluded, especially in the criminal context." Petition, pages 23, 24. This Court may one day be presented with the question of whether the First Amendment requires access to court and executive agency records of pending criminal cases. Resha's petition is a quantum leap beyond that question, asking whether access to court and executive agency documents is mandated by the First Amendment when the proceedings have been fully open to press and public scrutiny, the former defendant was not adjudicated guilty, and the

litigation is ended. The issue is not ripe.

Respectfully submitted,

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Counsel for Respondent

APPENDIX

IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL
CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

CASE NO: 90-674

STATE OF FLORIDA, :
vs. :
KATIE TUCKER, :
Defendant. :

PROCEEDING: Motion To Vacate Order Sealing Records

DATE: January 27, 1992

JUDGE: HONORABLE N. SANDERS SAULS
Circuit Judge

LOCATION: Leon County Courthouse
Tallahassee, Florida 32301

REPORTED BY: JUDY W. HUSSEY, C.S.R.
Official Court Reporter
Leon County Courthouse
Tallahassee, Florida 32301
(904) 487-3062

APPEARANCES:

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For Mr. Resha:

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WILLIAM FRIEDLANDER, Esquire

* * *

[p. 31] MR. DUFFY: It's at FDLE.

THE COURT: That Mr. Johnson and Mr. Friedlander they have elluded [sic] to that they need, which they contemplated, is right there. Now the only thing that could be left that you say there is a problem with this is that I notice you argue in your briefs something about whether or not we could have any impeachment.

MR. JOHNSON: Yes, sir.

THE COURT: And I ain't never heard of something like that if you've got a withhold, a no contest and a withhold and it goes in.

MR. JOHNSON: Well, Your Honor, you heard of it in the two cases I cited where they said that you could do that.

THE COURT: Sir?

MR. JOHNSON: I cited two cases in the memorandum –

THE COURT: Yeah, I didn't agree with those.

[p. 32] MR. JOHNSON: I can appreciate that you don't agree with them, Your Honor. Mr. Ehrhardt is skeptical of them as well, but they are the law in behalf of Florida and it hasn't been settled here and I would like to let Judge Davey decide that in the civil case what evidence he's going to let in. And if you preclude him from doing that by leaving that file here, then we end up with the same thing where we've got two judges working at cross purposes again.

THE COURT: Well you're going to have to have two working along to begin with because he's over there running the civil track and I'm over here. So to clarify it, so I don't – so there's not any misunderstanding, I would like for ya'll to try to sit down and work all this out.

But, you know, from what I've heard and from what I've seen and from what my understanding of the law is, you can't use what has happened here as a method of using impeachment based on prior convictions. So I am not going to unseal this. But I will modify my order to permit you – however, it can be devised – access to all that other.

And that would also have to be, even to that extent, it's going to be loaded up with injunctions and specifically and it needs to go directly to – who is [p. 33] your client? How many clients have you got? See, I want to know about that.

MR. FRIEDLANDER: Resha and two corporations.

THE COURT: And I want them specifically enjoined under this order, maybe they have to be in here to hear it or however I need to get it set up to do it so they know specifically if they take any of this information that maybe you've had to discuss with them or whatever or they try and go and, in effect, use if for some purpose to just spite, you know, as far as this particular defendant wherever she is or whatever she's doing and whatever capacity something to attempt to hurt whatever her status is now, then by me opening this, I don't want that to happen and I would want them under pain of contempt if they did.

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[p. 43] THE COURT: It's kind of simple I think, Mr. Friedlander. You just want everything that there is in the investigative file, right?

MR. FRIEDLANDER: Everything at the D.O.R. and everything at the FDLE, tangible and documentary. If a memorandum was written by Katie Tucker that was back dated by eighteen months and typed by her on a typewriter which states, "I didn't tell you to do the things that you've been doing," and which was obviously created to save her job with the Cabinet, and it's a piece of paper it looks like this, you come to this quantity, that's the same kind of evidence that they would have have used to prosecute her and put her in jail. Well now she has been –

THE COURT: She might have been saying that did not occur and the State might have been proving whatever it is you're trying to prove. What is your theory of – never mind. I don't want your theory of your cause of action in your civil suit. But go ahead.

MR. FRIEDLANDER: I just want to make it clear that I don't believe the fact that that piece of paper might have been used in the criminal prosecution justifies keeping it out of the civil trial simply because she has [p. 44] pled nolo and gotten a withhold. I think it's only the fact that she pled nolo and got the withhold that doesn't go into the civil jury. None of the facts or circumstances around it. We could still prove the cover up. We can't prove she was prosecuted for the cover up and that there was a withhold. Is that what you're saying? Because if that's what you're saying, I understand it.

THE COURT: Yeah. I don't see any real problem.

MR. FRIEDLANDER: He doesn't agree at all. He thinks that he should have the right to put in the fact that she was prosecuted and the result of the prosecution.

THE COURT: Oh, I know that.

MR. FRIEDLANDER: And you've ruled –

THE COURT: I'm respectfully disagreeing with him on that one. He will take me down the hill there if he wants to on that. But no, I don't think, from what I've looked at, what you've got here, that's not something that can been used for impeachment purposes. And what you need to do is concentrate on what you're looking for as

your proof on the underlying facts and not for any impeachment purposes.

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